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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1281. 852 ~~526~~ 177

WILLIAM C. WILSON, PLAINTIFF IN ERROR,

vs.

JESSE SELIGMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 8, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1231.

WILLIAM C. WILSON, PLAINTIFF IN ERROR,

vs.

JESSE SELIGMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1888, thereof, between William C. Wilson, plaintiff, and Jesse Seligman, defendant, a manifest error hath happened, to the great damage of the said plaintiff, William C. Wilson, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, presiding associate justice of the Supreme Court of the United States, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk Circuit Court United States, Eastern Division of the Eastern Judicial District of Missouri.

Allowed by—
D. J. BREWER, *Circuit Judge.*

Sept. 17th, '88.

2 [Endorsed:] No. 2898. United States circuit court, eastern division of the eastern judicial district of Missouri. William C. Wilson *vs.* Jesse Seligman. Writ of error to the circuit court of the United States for the eastern dist. of Missouri, eastern division. Returned and filed 17th day of Sept., 1888. A. P. Selby, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this 25th day of September, A. D. 1888.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk of said Court.

3 The United States of America to Jesse Seligman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, wherein William C. Wilson is plaintiff and said Jesse Seligman is defendant, and said William C. Wilson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, judge of the circuit court of the United States for the eastern district of Missouri, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Sept. 17th, '88.

DAVID J. BREWER,
Judge United States Circuit Court,
Eastern District of Missouri.

4 [Endorsed:] No. 2898. United States circuit court, eastern division of the eastern judicial district of Missouri. William C. Wilson *vs.* Jesse Seligman. Citation. Filed Sept. 17, 1888. A. P. Selby, clerk.

I acknowledge to having rec'd a copy of within citation this Sept. 17th, 1888.

JOHN O'DAY & J. O. BROADHEAD,
Att'ys for Seligman.

5 UNITED STATES OF AMERICA.

Eastern Division of the Eastern Judicial District of Missouri, ss:

In the Circuit Court of the United States in and for the Eastern Division of said Judicial District.

Be it remembered that on the eighth day of September, A. D. 1887, the following, among other, proceedings were had and appear of record in said court, to wit:

Transcript Filed.

William C. Wilson, Plaintiff,
vs. } 2898.
Jesse Seligman *et al.*, Defendants.

Now come defendants, by John O'Day, their attorney, and file transcript from the St. Louis circuit court and enter appearance herein.

Said transcript is in words and figures following, to wit:

Transcript.

State of Missouri, }
City of St. Louis, } *ss:*

Be it remembered that heretofore, to wit, on the 9th day of May, 1887, there was filed in the office of the clerk of the circuit court, city of St. Louis, a petition wherein William C. Wilson is plaintiff and James Seligman and Jesse Seligman are defendants.

Upon the filing of which petition a summons was issued for said defendants, directed to the sheriff of the city of St. Louis, and was by him duly returned, executed to Jesse Seligman, defendant, James Seligman, not found; which said petition, summons, and return are respectively in words and figures as follows, to wit:

6 *Petition.*

In the Circuit Court of the City of St. Louis, Mo. June Term, 1887.

William C. Wilson, Plaintiff,
against
Jesse Seligman and James Seligman, Defendants.

The said plaintiff, for cause of action against said defendants, states that on the 2nd day of April, A. D. 1883, said plaintiff, by the judgment and consideration duly given of said court, duly recovered a judgment for the sum of seventy-two thousand seven hundred and ninety-nine and $\frac{38}{100}$ dollars, with interest and costs, against the Memphis, Carthage and Northwestern Railroad Company, a corporation before that time created under the laws of the State of Missouri; that on the seventh day of April, A. D. 1883, four executions in due form of law were duly issued on and for the amount, respectively, of said judgments from the clerk's office of said court, duly signed and attested by said clerk, with the seal of said court affixed, directed and delivered to the sheriffs of Lawrence, Jasper, and Newton counties, in said State, and to the sheriff of the said city of St. Louis, returnable to said court on the first Monday of June, A. D. 1883, and commanding said sheriffs out of the goods and chattels and real

estate of said railroad company to cause to be made the judgment aforesaid; that said executions, having been at the said time of the issue thereof delivered to said sheriffs, were each and all by said sheriffs, on and before the 4th day of June, A. D. 1883, returned to said court and filed in said clerk's office, with the return by each of said sheriffs that no goods, chattles, or real estate of said company had been or could be found in either of said counties or in said city
of St. Louis, and plaintiff says that said company, at and
7 ever since the time of the rendition of said judgment, was and
has been hopelessly insolvent.

Plaintiff further states that during the entire year of 1883 said defendants, James and Jesse Seligman, under the firm name of J. & W. Seligman & Co., were the joint holders and owners as such firm of six million dollars of the capital stock of said railroad company, on which not exceeding one million dollars of cash has ever been paid by them or either of them, leaving five million dollars of said stock so held and owned by said defendants wholly due and unpaid, and that said defendants, being such stockholders, by their counsel and attorneys, defended the suits of plaintiff against said company, in which said judgment was rendered.

Plaintiff further states that on the 9th day of July, A. D. 1883, said plaintiff filed in said court a motion in writing for an order by said court directing the issue of an execution against said defendants as such stockholders for the full amount of said judgment of plaintiff against said company, according to the provisions of section seven hundred and thirty-six of the Revised Statutes of said State, and that notice in writing that said motion would be presented to said court which so gave said judgment, on the first day of the October term, A. D. 1883, thereof, together with a copy of said motion, were served on and delivered to each of said defendants, James and Jesse Seligman, on the second day of July, A. D. 1883.

Plaintiff further states that said motion, having been presented to said court in the open session thereof, according to said notice so served, was duly heard by said court and taken under advisement until the 3rd day of December, A. D. 1883, on which said last day said court duly gave final judgment on said motion in favor of plaintiff and against said defendants, by which said court duly ordered — adjudged that at the date of the rendition of the said judg-
ment against said company and the issue and return of said
8 executions Jesse Seligman and James Seligman, defendants
in that motion, were stockholders of said Memphis, Carthage
and Northwestern Railroad Company, owning and holding as such 60,000 shares of the stock of said company of the par value of $100.00 each; that there remained due and unpaid upon said 60,000 shares of stock the sum of $5,000,000, and that there remained due and unpaid upon said judgment the sum of $75,838, and that said Jesse Seligman and James Seligman were liable to the execution of plaintiff in the said sum of $75,838, and that said motion be sustained, and that execution issue in favor of said plaintiff against

said Jesse Seligman and James Seligman for the sum of $75,838.00 and the costs of said motion.

Plaintiff further states that no part of either of said judgments has been paid except the sum of six thousand three hundred and ninety-four $\frac{20}{100}$ dollars, which has been realized upon executions issued on said last judgment against Jesse and James Seligman, and that the balance of sixty-nine thousand four hundred and forty-three $\frac{80}{100}$ dollars is wholly due and unpaid plaintiff from said defendants, James and Jesse Seligman, upon said judgment and order against them rendered as aforesaid, for which last sum, together with interest and costs of suit, plaintiff prays judgment.

WILLIAM C. WILSON.

BOTSFORD & WILLIAMS,
For the Plaintiff.

Summons.

STATE OF MISSOURI, *City of St. Louis:*

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to summon Jesse Seligman and James Seligman to appear before the judges of our circuit court on the
9 first day of the next term thereof, to be held in the city of
St. Louis, at the court-house, in said city, on the first Monday of June next, then and there to answer the complaint of William C. Wilson as set forth in the annexed petition; and have you then and there this writ.

Witness Philip H. Zepp, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis, this ninth day of May, in the year of our Lord eighteen hundred and eighty-seven.

[SEAL.] PHILIP H. ZEPP, *Clerk.*

Sheriff's Return.

Executed this writ in the city of St. Louis this 9th day of May, 1887, by delivering a copy of the writ and petition as furnished by the clerk to Jesse Seligman, one of the within-named defendants. James Seligman, the other within-named defendant, cannot be found in the city of St. Louis.

HENRY F. HARRINGTON, *Sheriff,*
By J. A. MEAD, *Deputy.*

Fee, $1.50.

And afterwards, at the June term, 1887, of said court, the following proceedings were had in said cause, to wit:

Petition for Removal Filed.

WILLIAM C. WILSON
vs. } 73655.
JAMES SELIGMAN *et al.*

TUESDAY, *June 7th*, 1887.

On petition of defendant, Jesse Seligman, this day filed, it is ordered that, upon said defendant giving bond in the sum of $500.00, with sureties, to be approved by the court, the clerk of this court forthwith certify to the circuit court of the United States for the eastern division of the eastern district of Missouri a full, true, and complete transcript of the record and proceedings in this
10 cause; which said petition and bond are, respectively, in words and figures as follows, to wit:

Petition for Removal.

STATE OF MISSOURI, } *ss:*
City of St. Louis,

In the Circuit Court of St. Louis City.

WILLIAM C. WILSON, Plaintiff,
vs.
JESSE SELIGMAN and JAMES SELIGMAN, Defendants.

Petition for removal by non-resident.

To the honorable the circuit court of St. Louis city, State of Missouri:

Your petitioner respectfully shows that the matter and amount involved in the above-entitled cause and in dispute exceeds, exclusive of interest and costs, the sum or value of fifty thousand dollars.

Your petition- further shows that the controversy in said suit is between citizens of different States, and that the petition- was at the time of the commencement of this suit and still is a citizen of the State of New York, and that James Seligman was then and still is a citizen of the State of New York, and that William C. Wilson, the plaintiff, — then and still is a citizen of the State of Missouri.

Your petitioner further shows that said James Seligman, in said petition mentioned and in the caption thereof described as a codefendant with your petitioner, has never been served with process in said cause nor has this court obtained jurisdiction over the person of said James Seligman.

And your petitioner offers herewith a bond, with good and sufficient surety, in the penal sum of five hundred dollars, condi-
11 tioned for his entering in the circuit court of the United States for the eastern district of Missouri, on the first day of

its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petioner therefore prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States within and for the eastern district of Missouri, according to the statute in such case made and provided.

And your petitioner will ever pray, etc.

JESSE SELIGMAN.

JOHN O'DAY,
Attorney for Petitioner.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Adiel Sherwood, being duly sworn, on oath deposes and says that he is one of the attorneys for Jesse Seligman, defendant and petitioner in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the matter and things therein stated are true, as he verily believes.

ADIEL SHERWOOD.

Subscribed and sworn to by said Adiel Sherwood this 7th day of June, A. D. 1887, before me—

PHILIP H. ZEPP, *Clerk.*

Bond for Removal.

Know all men by these presents that we, R. C. Kerens, as principal, and H. L. Morrill, of the city of St. Louis and State of Missouri,
as surety, are held and firmly bound unto Wm. C. Wilson
12 in the penal sum of five hundred (500) dollars, lawful money
of the United States; for the payment of which, well and truly
to be made, we bind ourselves and our heirs, executors, or administrators, jointly and severally and firmly by these presents.

Whereas Jesse Seligman has petitioned the circuit court of St. Louis city, in the State of Missouri, for the removal of a certain suit therein pending, wherein Wm. C. Wilson is plaintiff and the said Jesse Seligman and James Seligman are defendants, into the circuit court of the United States for the eastern district of Missouri:

Now, therefore, the condition of this obligation is such that if Jesse Seligman shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the eastern district of Missouri, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the said circuit court of the city of St. Louis and State of Missouri in which said William C. Wilson is plaintiff and Jesse Seligman and James Seligman are defendants, and shall pay all costs that may be awarded by said circuit court if said circuit court shall hold that said cause was wrongfully or improperly removed thereto, and shall also appear in said circuit court and enter special bail in such cause if special bail was originally required therein, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void; otherwise of force.

Witness our hands and seals this 7th day of June, 1887.

R. C. KERENS. [SEAL.]
H. L. MORRILL. [SEAL.]

Approved by the court June 7th, 1887.
Attest: PHILIP H. ZEPP, *Clerk.*

13 UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis, } *ss:*

I hereby certify that on this 7th day of June, 1887, before me personally came and appeared R. C. Kerens, the principal in the within bond, personally known to me and known to me to be the person in and who executed the foregoing bond as principal, and that he thereupon acknowledged that he executed the same in the manner and form and for the purposes therein mentioned.

[SEAL.] ADIEL SHERWOOD,
Notary Public.

STATE OF MISSOURI,
City of St. Louis, } *ss:*

I hereby certify that on this 7th day of June, 1887, before me personally came and appeared H. L. Morrill, to me well known and known to me to be the person in and who executed the foregoing bond as surety, and thereupon acknowledged to me that he executed the same in the manner and form and for the purposes therein mentioned.

[SEAL.] ADIEL SHERWOOD,
Notary Public.

Clerk's Certificate.

STATE OF MISSOURI,
City of St. Louis, } *ss:*

I, Philip H. Zepp, clerk of the circuit court, city of St. Louis, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain on file and of record in my office.

14 In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 3d day of August, 1887.

[SEAL.] PHILIP H. ZEPP, *Clerk.*

Costs in Circuit Court, City of St. Louis.

Clerk Zepp	$6 30
Sheriff Harrington	1 50
Att'ys Botsford & Williams	3 00
	$10 80

And afterwards, to wit, on the seventeenth day of October, A. D. 1887, the following further proceedings were had and appear of record in said cause, to wit:

Stipulation Waiving Jury Filed.

William C. Wilson, Plaintiff,
vs. } 2898.
Jesse Seligman *et al.*, Defendants.

Now comes the plaintiff, William C. Wilson, and also comes defendant, Jesse Seligman, and said parties file a stipulation waiving a jury herein.

Said stipulation is in words and figures following, to wit:

Stipulation Waiving Jury.

W. C. Wilson, Pl'ff., *vs.* Jesse Seligman *et al.*, Def'ts.

It is hereby agreed between plaintiff & defendant, Jesse Seligman, that a jury in above case be waived.

BOTSFORD & WILLIAMS,
Att'ys for Pl'ff.
J. O. BROADHEAD & JOHN O'DAY,
Atty's for Def't, Jesse Seligman.

And afterwards, to wit, on the fourteenth day of April, A. D. 1888, there was filed in said cause the separate amended answer of Jesse Seligman, in words and figures following, to wit: 15

Separate Amended Answer of Jesse Seligman.

United States of America,
Eastern Division of the Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States within and for said Eastern Division of the Eastern District of Missouri. M'ch Term, 1887.

William C. Wilson, Plaintiff,
vs.
Jesse Seligman and James Seligman, Defendants.

Separate amended answer of the defendant, Jesse Seligman.

The defendant, Jesse Seligman, for a separate answer to plaintiff's petition herein, denies that on the 2nd day of April, A. D. 1883, or at any other time plaintiff recovered judgment in the circuit court, city of St. Louis, against the Memphis, Carthage & Northwestern Railroad Company for the sum of $72,799.38 or any other sum; denies that on the 7th day of April, A. D. 1883, or at any other time four executions were duly issued out of said circuit court, city of St. Louis, for the amount of said alleged judgment in plaintiff's petition mentioned, averred to have been obtained in favor of plaintiff and against said Memphis, Carthage & Northwestern Railroad Company, and directed and delivered to the sheriffs of Lawrence, Jasper, and Newton counties, in said State, and to the sheriff of said city of St. Louis, respectively, returnable to said court on the first Monday in June, A. D. 1883, or at any other time; denies that a return of *nulla bona* was made on each of said executions by the sheriff of the city of St. Louis and the counties of Lawrence, Jasper, and Newton hereinbefore named, respectively.

16 Defendant denies that during the entire year of 1883 the defendants, Jesse Seligman and James Seligman, under the firm name of J. & W. Seligman & Company, were joint owners and holders as such firm of six million dollars of the capital stock of the said Memphis, Carthage & Northwestern Railroad Company or any part thereof, and denies that the defendant and James Seligman, in any manner, form, or capacity, held any unpaid stock in the said Memphis, Carthage & Northwestern Railroad Company; denies that the defendants, Jesse Seligman and said James Seligman, or the firm of J. & W. Seligman & Company or any of the members thereof were in any manner or form indebted to the said Memphis, Carthage & Northwestern Railroad Company; denies that plaintiff, on the 9th day of July, A. D. 1883, filed in the circuit court, city of St. Louis, a motion in writing for an order by said court directing the issue of an execution against the defendants, Jesse Seligman and James Seligman, as stockholders for the full amount of said judgment hereinbefore mentioned against said Memphis, Carthage & Northwestern Railroad Company; denies that notice in writing of said motion so to be presented to said court was served on the defendants, Jesse Seligman and James Seligman, on the 2nd day of July, A. D. 1883, or at any other time.

The defendant, Jesse Seligman, further denies that the motion alleged to have been filed by plaintiff was presented to said circuit court, city of St. Louis, in open session thereof, and denies that on the 3rd day of December, A. D. 1883, said circuit court duly gave final judgment on said alleged motion in favor of plaintiff and against said defendants, Jesse Seligman and James Seligman, by which said court ordered and adjudged that at the date of the rendition of said judgment against said Memphis, Carthage & Northwestern Railroad Company, and the issue and return of said
17 execution referred to in plaintiff's petition herein, Jesse Seligman and James Seligman, defendants in said motion, were stockholders in said Memphis, Carthage & Northwestern Railroad Company, owning and holding, as such, sixty thousand shares of the stock of said company of the par value of one hundred dollars each, and that there remained due and unpaid upon such sixty

thousand shares of stock the sum of five million dollars, and that there remained due and unpaid upon said pretended judgment referred to in plaintiff's petition, alleged to have been rendered in favor of plaintiff and against the Memphis, Carthage & Northwestern Railroad Company, the sum of $75,838, and that said Jesse Seligman and James Seligman were liable to said execution plaintiff Wilson in said sum of $75,838, and that said motion be sustained and execution issue in favor of said plaintiff against said Jesse Seligman and James Seligman for said sum of $75,838 and costs of said motion.

The defendant, Jesse Seligman, for a further separate answer and defense to plaintiff's petition herein, avers and charges the fact to be that the alleged order and judgment of the circuit court, city of St. Louis, referred to in plaintiff's petition, made and entered on the 3rd day of December, A. D. 1883, wherein and by which said circuit court, city of St. Louis, on said day, on the motion of plaintiff, gave final judgment in favor of plaintiff and against said defendants, Jesse Seligman and James Seligman, and by which said court, amongst other things, rendered judgment against the defendants, Jesse and James Seligman, for the sum of $75,838, and ordered that execution issue thereon in favor of plaintiff and against the defendants, Jesse Seligman and James Seligman, for said sum, together with costs, is null and void in this, that the said circuit court, city of St. Louis, at the time it made said order and judgment in favor of said Wilson and against said defendants, James and Jesse Seligman, had not acquired
18 jurisdiction of the persons of said James and Jesse
Seligman, nor either of them, nor had process or notice been served upon said James and Jesse Seligman or either of them in said proceedings at any place within the State of Missouri; nor were said James and Jesse Seligman or either of them citizens of or within said State of Missouri at that time and never had been, but were then and for many years previous thereto were domiciled in and citizens of the city and State of New York; nor did the said James and Jesse Seligman or either of them appear to said proceedings in person or by counsel; and the defendant, Jesse Seligman, avers that the only notice of said proceedings which was served upon the defendants, James and Jesse Seligman, or either of them, was a notice served upon them within the city and State of New York where they were domiciled; that unless they showed cause to the contrary the circuit court, city of St. Louis, would in said proceeding order and award an execution against them for said sum of $75,838, claimed by said William C. Wilson. Wherefore defendant says no notice having been served upon said James Seligman or Jesse Seligman within the State of Missouri, and said James or Jesse Seligman not appearing in said proceedings in said circuit court, city of St. Louis, the order, judgment, and decree of said circuit court, city of St. Louis, if any were rendered, ordering, adjudging, and decreeing an execution for said sum hereinbefore mentioned, or any part thereof, in favor of said William C. Wilson against said James and Jesse Seligman, was null and void and of no force and effect.

Defendant, for another and further answer and defense to plaintiff's action herein, avers and charges the fact to be that since the commencement of this action the supposed judgment sued upon herein was by the decree of the circuit court, city of St. Louis, duly made and rendered on the fifth day of September, 1887, set aside, annulled, cancelled, and for nought held and esteemed, 19 and that said pretended judgment has no legal force, validity, or effect.

And defendant, Jesse Seligman, for another and further separate answer and defense to plaintiff's petition herein, denies each and every allegation therein contained, severally and collectively, not hereinbefore expressly answered, admitted, or denied.

JOHN O'DAY,
JAMES O. BROADHEAD, &
E. D. KENNA,
Attorneys for Defendant, Jesse Seligman.

And afterwards, to wit, on the fourteenth day of April, A. D. 1888, there was filed in said cause a reply to the amended answer, in words and figures following, to wit:

Reply to Amended Answer.

UNITED STATES OF AMERICA:

In the U. S. Circuit Court for the Eastern Division of the Eastern District of Missouri. March Term, A. D. 1888.

WILLIAM C. WILSON, Plaintiff, *vs.* JESSE SELIGMAN, Defendant.

Now comes said plaintiff, and for reply to the new matter contained in the separate amended answer of said Jesse Seligman said plaintiff denies generally each and every allegation of such new matter.

BOTSFORD & WILLIAMS,
For the Plaintiff.

And afterwards, to wit, on the said fourteenth day of April, A. D. 1888, the following further proceedings were had and appear 20 of record in said cause, to wit:

Case Argued and Submitted.

WILLIAM C. WILSON, Plaintiff,
vs. } 2898.
JESSE SELIGMAN, Defendant.

Now comes the defendant, by attorney, and by leave of court files amended answer, to which plaintiff, by attorney, files replication.

And this cause coming on to be heard the same is submitted to the court without the intervention of a jury, upon the pleadings, proofs, and arguments of counsel, but the court, not being fully advised as to what judgment to render in the premises, takes further time to consider thereof.

And afterwards, to wit, on the seventeenth day of September, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

Judgment.

WILLIAM C. WILSON, Plaintiff,
vs. } 2898.
JESSE SELIGMAN, Defendant.

Now again come the parties hereto, by their respective attorneys, the plaintiff by James S. Botsford, Esquire, and the defendant by James O. Broadhead, Esquire, and John O'Day, Esquire, and this cause having been heretofore submitted to the court without the intervention of a jury, upon the pleadings, arguments of counsel, and proofs, and the court, being now fully advised in the premises, finds the issues thereon for the defendant.

It is, therefore, now considered by the court that the plaintiff take nothing by this writ herein; that the defendant, Jesse Seligman, go hence without day and have and recover of said plaintiff, William C. Wilson, his costs and expenses herein incurred, and that a fee bill or execution issue therefor.

21 *Motion for New Trial Filed, Submitted, Overruled.*

And thereupon the said plaintiff, by his attorney, files motion to set aside the judgment entered herein and for a new trial, which is heard and submitted, and the court having considered the same, it is ordered that said motion be, and the same is, overruled.

Finding of Facts Filed.

At the hearing of said cause the court found the facts from the evidence and ordered that such finding of facts be filed and made part of the record herein, which is accordingly done.

Writ of Error Allowed. Citation Signed.

Now, also, on this day the said plaintiff presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation, citing and admonishing the said defendant to be and appear at a Supreme Court of the United States, at the next term thereof, on the first day of said term, to be begun and holden at Washington, D. C., on the second Monday of October next; which said writ of error is allowed and said citation signed by the judge.

Appeal Bond Approved.

And said plaintiff further presents to the court his bond in the penal sum of five hundred dollars ($500.00), which bond is approved and ordered to be filed and made part of the record herein.

Said motion for new trial is in words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

William C. Wilson, Plaintiff,
vs. } 2898.
Jesse Seligman *et al.*, Def'ts.

22 Now comes the plaintiff and moves the court to set aside the finding and judgment herein for the reason that on the uncontradicted evidence and the facts found by the court the finding and judgment of the court should have been for the plaintiff and against the defendant.

BOTSFORD & WILLIAMS,
For the Plaintiff.

Said finding of facts is in words and figures following, to wit:

Finding of Facts.

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

William C. Wilson, Plaintiff,
against
Jesse Seligman, Defendant.

Finding of facts and judgment.

Now, at this day, come the above parties, by their attorneys, and this cause, as to defendant, James Seligman, is dismissed; and thereupon this cause, as between plaintiff and defendant, Jesse Seligman, coming on for trial on the petition, amended answer, and reply before Hon. David J. Brewer, circuit judge, a trial by jury herein having been waived by written stipulation filed herein, the evidence of the parties was heard, upon which evidence the court makes the following finding of facts:

23 That on the 2d day of April, 1883, the said plaintiff, by the judgment and consideration duly given of the circuit court of the city of St. Louis, Missouri, duly recovered a judgment for the sum of $72,799.38, with interest and costs, against the Memphis, Carthage and Northwestern Railroad Company; that on the 7th day of April, 1883, four executions on said judgment were issued for the amount of said judgment to the sheriffs of Lawrence, Jasper and Newton counties, in said State, and to the sheriff of said city of St. Louis, which several executions were returned to said circuit court with the return by each of said sheriffs that no goods, chattels, or real estate of said railroad company had been or could be found in either of said counties or in said city.

That said railroad company, at the time of rendition of said judgment against it, was and ever since has been insolvent; that on the 9th day of July, 1883, plaintiff filed in said circuit court a motion in writing for an order by said court directing the issue of an execution against said Jesse and James Seligman as stockholders in said railroad company for the full amount of said judgment of plaintiff against said company, and that notices that said motion would be heard in said court at the October term of said court for the year 1883 were served on and delivered to each of said Jesse Seligman and James Seligman in person at the domicile of said Jesse Seligman and James Seligman, in the city and State of New York, on the 2nd day of July, 1883; that on the 3rd day of December, 1883, said circuit court made an order and gave final judgment on said motion in favor of plaintiff and against said Jesse Seligman and James Seligman, by which said court ordered and adjudged that at the date of the rendition of the said judgment against said railroad company and of the issue and return of said executions said Jesse Seligman and James Seligman were stockholders of said railroad company, owning and holding as such sixty thousand shares of the stock of said company of the par value of one hundred dollars each; that there remained due and unpaid upon said stock the sum of five millions of dollars, and that there remained due and unpaid upon said judgment the sum of $75,838.00, and that said Jesse and James Seligman were liable to the execution of plaintiff in said last sum, and that said motion be sustained, and that a general execution issue in favor of said plaintiff and against said
24 Jesse and James Seligman for the amount of said last sum of
$75,838.00 and the costs of said motion.

That of said last amount the sum of $6,394.20 has been realized by and paid to plaintiff by sale of property under execution issued on said judgment, and that the balance of each of said judgments remains wholly due and unpaid.

That a duly certified transcript of the pleadings, notice, motions, and service of the same and record and proceedings of said court in the cause in which said judgment was given against said Jesse and James Seligman is here set out in full and made a part of this finding of facts.

Said transcript is in words and figures as follows:

Transcript "A."

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Be it remembered that heretofore, to wit, on the 11th day of August, 1881, there was filed in the office of the clerk of the circuit court within and for the city of St. Louis, State aforesaid, a petition wherein William C. Wilson is plaintiff and Memphis, Carthage and Northwestern Railroad Company is defendant; which petition is in the words and figures as follows, to wit:

Petition.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

In the Circuit Court of the City of St. Louis, Missouri, at the October Term, A. D, 1881.

WILLIAM C. WILSON, Plaintiff,
against
MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

Plaintiff, complaining of defendant herein, for his cause of action alleges—

I. That on the 15th day of October, A. D. 1871, defendant was, has ever since been, and now is, a corporation duly created, organized, and existing under the laws of the State of Missouri,
25 under the corporate name and style of the Memphis, Carthage
and Northwestern Railroad Company, and has and usually keeps an office in the city of St. Louis for the transaction of the usual and customary business.

II. That on the 17th day of October, 1871, said defendant entered into an agreement in writing of that date with Edward Burgess, of the city of St. Louis, whereby said Burgess covenanted and agreed with defendant to construct and complete the grading, masonry, paving, grubbing, and clearing, including the furnishing of materials requisite for the same, upon that part of the railroad of defendant between Pierce City, in the county of Lawrence, and the depot in the town of Carthage, in the county of Jasper, in said State, on the terms and conditions mentioned in said contract, and in payment for said work and materials said Burgess was to receive from defendant the bonds of any towns, townships, and counties through which said railroad of defendant passes, bearing ten per cent. interest per annum or their equivalent in such bonds bearing a lower rate of interest, said bonds to be duly issued according to law to said defendant, said defendant covenanting and agreeing to do and perform all the acts necessary to enable said Burgess to obtain all of said municipal bonds due him under said contract as soon as practicable by the compliance on its part with all the conditions under which said bonds were subscribed and pledged; that by the terms of said contract it was further provided that the same price should be paid said Burgess for all additional work and extra hauling done and performed by him in the construction of said road-bed as fixed in the estimate and specifications of said contract, and thirty-five cents per tie for all ties furnished by said Burgess to defendant, to be paid for in cash as said work progressed.

That said contract is lost and plaintiff is unable to obtain a copy thereof.

26 III. That under said contract said Burgess performed work and furnished materials on the road-bed of defendant in the township of Marion, in said Jasper county, constructing said road-bed, according to the terms and stipulations of said contract, from Pierce City to the depot at Carthage, and performing additional work and extra hauling, and furnished ties for defendant's road-bed, as specified in said contract, which said construction, work, labor, materials, and ties were accepted by said defendant.

IV. That afterwards, to wit, on the 13th day of June, 1872, a settlement of said account of said Burgess with said defendant for said work, materials, and labor in constructing said road-bed of defendant's and for said ties and extra labor thereon was had, and defendant, in part payment of the indebtedness therefor found due, assigned and transferred to said Burgess fifty thousand dollars of the bonds of Jasper county for Marion township of said county, bearing ten per cent. per annum, subscribed for stock in said defendant's railroad, and said Burgess accepted the same in payment of the sum of forty-five thousand one hundred and forty-eight $\frac{34}{100}$ dollars of said indebtedness.

V. That defendant failed and neglected to perform the terms and conditions of said contract on its part and failed and neglected to do and perform all the acts necessary to enable said Burgess to obtain the legally issued bonds of said Jasper county for the township of Marion in the said sum of fifty thousand dollars or any other sum, as hereinafter stated.

VI. That the said township of Marion was and is one of the municipal townships of said county of Jasper and State of Missouri through which the railroad of said defendant passes, and which said road-bed was constructed in said township of Marion under said contract by said Burgess; that said township of Marion, at an
27 election duly held in said township on the 5th day of March, A.
D. 1872, voted a subscription of seventy-five thousand dollars to the capital stock of said railway company upon the terms and conditions contained in the order of the county court of said county of Jasper of the 10th of February, 1872, and that said county court made an order, of date 28th March, 1872, that subscription be made and directing that said bonds of said county for and on behalf of said township to that amount be issued in payment of said subscription in accordance with the terms thereof.

That said bonds of said county for said municipal township of Marion in the sum of fifty thousand dollars, together with interest coupons thereto attached, were issued by said court of Jasper county in the month of October, 1872, and were thereafter delivered to said Burgess in part payment for said indebtedness so found due him for materials and work in constructing said road-bed of defendant from said Pierce City to and in said township of Marion: and said Burgess, believing said bonds of said Jasper county for and in behalf of said Marion township had been duly issued according to law and being at that time ignorant that said bonds were forged, fraudulent, and void, as hereinafter stated, duly accepted the said fifty thousand dollars of said bonds from said defendant in payment of said sum of

forty-five thousand one hundred and forty-eight & $\frac{34}{100}$ dollars so found due the said Edward Burgess from said railroad company for said work done and materials so furnished in constructing its said road-bed as aforesaid, and that said Burgess afterwards, to wit, on the 5th day of November, 1872, sold and transferred said fifty thousand dollars of said bonds to the plaintiff, who purchased the same in good faith and for value and without any notice whatever of the forged, fraudulent, and void issue thereof by said county court of Jasper county aforesaid, and said Wilson
28 is now the owner and holder thereof. A copy of one of said bonds and one of said coupons, alike in all respects except as to numbers, are herewith filed, marked Exhibit "B," and made a part of this petition; that said fifty thousand dollars of said bonds of said Jasper county issued for and on behalf of said Marion township to said defendant, the said Memphis, Carthage and Northwestern Railroad Company, and each of them were false, forged, fraudulent, and void, in this, to wit: Said bonds and each of them were falsely dated as of issue of the 28th day of March, 1872, although in fact they were not issued until long afterwards, to wit, in October, 1872, and they and each of them were never presented to the State auditor of said State of Missouri for registration, as required by law, at the time said bonds were so actually issued as aforesaid, and were never, in fact, registered by said State auditor, nor was there any certificate of registration ever made on said bonds by said State auditor, as required by law; that said bonds purported to be signed by one R. S. Merwin as president justice of said county court of Jasper county, Missouri, on said 28th day of March, 1872, when in fact and in law said Merwin was not at said last date such presiding justice; that said bonds and each of them were so signed and antedated as aforesaid for the purpose of evading the law requiring said bonds to be so registered and certified to give them validity, without the knowledge or consent of said Burgess, and that said bonds were and each of them are absolutely null and void.

That neither said Burgess nor said plaintiff at the time of the sale and transfer of said bonds to plaintiff had any knowledge, information, or belief as to the fraudulent and forged character of said bonds, and did not obtain such knowledge until long afterwards, as hereinafter stated.

29 That defendant failed and neglected to have said bonds of said township truly dated according to the time of the actual issue thereof; failed to have said bonds or any of them duly registered with the State auditor aforesaid and his certificate of registration thereof endorsed on said bonds, so as to give them validity, and failed to have said bonds duly issued according to law to said defendant, as it had agreed to do, and that said bonds and each of them so illegally issued and delivered to said Burgess were and are without any value whatever to said Burgess or to the plaintiff herein, and that by reason of the premises the said sum of forty-five thousand one hundred and forty-eight & $\frac{34}{100}$ dollars due said Burgess for work and labor done and materials furnished defendant in building its said road-bed as aforesaid is wholly due and unpaid from

defendant to said Burgess or said plaintiff herein from said 13th day of June, 1872.

That after the said sale and transfer of said bonds as aforesaid said Burgess, by an instrument of writing under his hand and seal, duly assigned and set over to plaintiff all the right, title, interest, claim, and demand which he, the said Edward Burgess, had or might have, in law or in equity, against said defendant railroad company or against any other person or persons, natural or corporate, for the payment of said debt of $45,148.34, together with all accrued interest thereon. Said instrument of assignment is herewith filed and marked "Exhibit C" and made a part of this petition.

VII. That after the said sale and transfer of said bonds to said Wilson said county of Jasper caused to be levied taxes on said Marion township for the purpose of paying the interest accruing on said bonds for the year 1873, but the same was never paid and thereafter refused to pay any interest on said bonds or to cause any
taxes to be levied on said Marion township for that pur-
30 pose; that, subsequent to the sale and transfer of said bonds
by said Burgess to plaintiff, the plaintiff sold and assigned a portion thereof to Charles E. Anthony and others for value and without notice that said bonds were false, forged, and fraudulent as aforesaid, and that after said county had refused to pay or to levy a tax to satisfy the accruing interest coupons on said bonds said purchasers caused suit to be instituted on the overdue interest coupons of said bonds against said Jasper county in the circuit court of the United States for the western district of Missouri, having jurisdiction thereof, and such proceedings were had in said cause that all and each of said bonds of said county issued for and on behalf of the township of Marion were by the order and judgment of said circuit court declared to be so falsely antedated, fraudulent, forged, and void, which said judgment of said circuit court was by the Supreme Court of the United States duly affirmed on writ of error in one of said causes, to wit, that of Anthony *vs.* Jasper County, at the October term, A. D. 1879, of said Court; whereupon said bonds so sold and transferred by said plaintiff were retransferred to him by the then holders thereof, and plaintiff now owns and holds all of said fifty thousand dollars of said bonds of said county so falsely issued for said Marion township, and paid to said Burgess, as hereinbefore stated.

That after said final decision of said Supreme Court declaring said bonds forged, fraudulent, and void, and after plaintiff had secured the retransfer to him of the bonds so negotiated by him in good faith as aforesaid, and prior to the bringing of this action, to wit, on the first day of July, 1881, plaintiff, as the assignee of said Burgess of said bonds and indebtedness, demanded in writing of said
defendant railroad company, through its proper officers, fifty
31 thousand dollars of good and valid bonds of said Marion
township, according to defendant's said written covenants and agreements with said Burgess, or the said sum of forty-five thousand one hundred and forty-eight & $\frac{34}{100}$ dollars, with accrued interest

thereon, in money, and then and there offered to return said false, forged, and antedated bonds of said Jasper county for said township to said defendant; but said defendant refused to either deliver to said plaintiff fifty thousand dollars or any of good and valid bonds of said county for said Marion township, or to pay said sum of money aforesaid or any part thereof, or to receive said false bonds from plaintiff; that said sum of forty-five thousand one hundred and forty-eight & $\frac{34}{100}$ dollars, together with accrued interest thereon from June 13th, 1872, is wholly due and unpaid to plaintiff herein as such assignee.

Plaintiff further offers to return all of said bonds and the unpaid interest coupons thereto attached to said defendant railroad company on the payment of said sum of money aforesaid to him, or to bring said bonds and coupons into this court whenever the said court shall so order and direct.

Wherefore, by reason of the premises, plaintiff says that a cause of action against said defendant railroad company has accrued to him to demand and receive from said defendant the said sum of forty-five thousand one hundred and forty-eight & $\frac{34}{100}$ dollars, together with interest thereon at 6 per cent. per annum from the 13th day of June, 1872, for which sum, together with his costs, the plaintiff prays judgment.

BOTSFORD AND WILLIAMS,
Attorneys for Plaintiff.

Upon the filing of which petition a summons was issued same
day, directed to the sheriff of the city of St. Louis; which
32 summons, together with the sheriff's return thereto, are re-
spectively in the words and figures as follows, to wit:

Summons.

CITY OF ST. LOUIS, *ss:*

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to summon Memphis, Carthage and Northwestern Railroad Company to appear before the judges of our circuit court on the first day of the next term thereof, to be held in the city of St. Louis on the first Monday of October next, then and there to answer the complaint of William C. Wilson as set forth in the annexed petition; and have you then and there this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis, this 11th day of August, in the year of our Lord eighteen hundred and eighty-one.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

Sheriff's Return.

Executed this writ in the city of St. Louis this 13th day of August, 1881, by delivering a copy of the writ & petition as furnished by the clerk to James Baker, president of The Memphis, Carthage and Northwestern Railroad Company, the within-named defendant.

ISAAC M. MASON, *Sheriff*,
By J. A. MEAD, *Dep'y*.

Fee, $1.00.

And afterwards, on the 4th day of October, 1881, the defendant, by its attorneys, files its motion to quash writ and return; which motion is in the words and figures as follows, to wit:

Motion to Quash.

In the Circuit Court for the City of St. Louis. October Term, 1881.

33 WILLIAM C. WILSON, Plaintiff,
vs.
THE MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

Now, at this day, comes James Baker, who has been served with process in the above-entitled cause as president of the Memphis, Carthage and Northwestern Railroad Company, and states that he is not president of said railroad company, nor was he such president, nor did he hold any office in said company at the time that he was served with process in said cause, on the 13th day of August, 1881; and the said James Baker further says that the time he was so served with process and for a long time previous thereto, to wit, for a period of more than five years previous thereto, the said Memphis, Carthage and Northwestern Railroad Company was and had been dissolved as a corporation.

And the said James Baker further says that on or about the 21st day of December, A. D. 1874, that the property and corporate franchises of the said Memphis, Carthage and Northwestern Railroad Company were sold out by Jesse Seligman and James A. Stewart under and by virtue of the provisions of a deed of trust theretofore executed by said railroad company, and then and thereafter said railroad company ceased to be a corporation; that thereafter the members of said corporation have not kept up or maintained its corporate existence nor had any elections of officers since March, 1874, and that the end and object for which said corporation was created has been long since destroyed.

Wherefore the said Baker moves that the writ in this case and the service thereof be quashed, and that the said suit be dismissed.

BROADHEAD, SLAYBACK &
HAEUSSLER AND
JOHN O'DAY,
Attorneys for James Baker.

34 And afterwards, at a special term of the circuit court, being the February term, 1882, thereof, the following proceeding was had in said court, to wit:

Bill of Exceptions of Jas. Baker Filed.

William C. Wilson
vs.
Memphis, Carthage and N. W. R'way Co. } 56752.

Monday, *March 20th*, 1882.

Now comes James Baker, by attorney, and tenders his bill of exceptions, which is allowed, signed, sealed, and filed and made part of the record herein.

Which said bill of exceptions is in the words and figures as follows, to wit:

Bill of Exceptions.

City of St. Louis, *State of Missouri:*

In the St. Louis Circuit Court.

William C. Wilson, Plaintiff,
vs.
The Memphis, Carthage and Northwestern Railroad Co. *et al.*, Defendants.

Be it remembered that the motion to quash the writ and return filed by James Baker in the above-entitled cause coming on to be heard on Friday, the 10th day of February, 1882, the following proceedings were had:

The said James Baker, by his attorneys, to support the motion, offered in evidence and read a certified copy of first mortgage executed by the Memphis, Carthage & Northwestern R. R. Co. to Jesse Seligman and John A. Stewart, trustees, which is in words and figures as follows:

First Mortgage of M., C. & N. W. R. R. Co. to Jesse Seligman and John A. Stewart.

Memphis, Carthage & Northwestern Railroad Company to Jesse Seligman and John A. Stewart, trustees.

35 First mortgage.

This indenture, made and entered into the first day of May, in the year of our Lord one thousand eight hundred and seventy-two, between the Memphis, Carthage and Northwestern Railroad Company, a corporation duly formed and existing under the laws of the States of Missouri and Kansas, party of the first part, and Jesse Seligman and John A. Stewart, both of the city and State of New York, party of the second part, witnesseth: That whereas the said Memphis, Carthage & Northwestern Railroad Company, under and in pursuance of the power contained in its charter and the provisions of the laws of the States of Missouri and Kansas, has commenced to construct and put in operation a railroad from the town of Pierce City, in Lawrence county, Missouri, extending thence in Missouri via Carthage to the State line between Missouri and Kansas, and thence via a route passing through or near Columbus and Oswego to a point at or near Independence, in the State of Kansas; and whereas power and authority is by law conferred upon said railroad company to borrow such sums of money as may be necessary for completing and operating the said railroad and to issue and dispose of the bonds of said company for any amount so borrowed and to mortgage the corporate property and franchises of said company to secure the payment of such bonds; and whereas the said railroad company has resolved to exercise its said borrowing power for the purposes above specified by issuing and selling bonds of the amount of five hundred dollars each and of one thousand dollars each, respectively, and with such rate of interest and with such provisions as to redemption as hereinafter appear, to the aggregate amount of one million nine hundred thousand dollars, by such issues as are hereinafter mentioned; and whereas it is intended that each of the said bonds shall be in the words and figures following, subject only to necessary variation as to the distinguishing numbers and amount hereof:

36 UNITED STATES OF AMERICA, *States of Missouri and Kansas.*

No. —. $1,000.00.

Memphis, Carthage and Northwestern Railroad Company.

First-mortgage seven per cent. sinking-fund bond, principal and interest payable in gold, free of U. S. Government tax.

Know all men by these presents that the Memphis, Carthage & Northwestern Railroad Company is indebted to Jesse Seligman and John A. Stewart, of the city of New York, in the State of New York, or bearer in the sum of — dollars in gold coin of the United States, which the said railroad company promises to pay to the bearer hereof on the first day of May, A. D. one thousand nine hundred and two, in the said city of New York, with interest thereon from the date hereof at the rate of seven per centum per annum, payable, in gold coin aforesaid, semi-annually, at its office or agency in the said city of New York, on the first days of November and May of each year, upon the presentation and surrender of the coupons hereto attached as they severally become due as provided therein; and in case of default in the payment of any half-yearly installment of interest which shall have become due and been demanded, and such default shall have continued for six months after demand, the principal of their bond shall also become due in the manner and with the effect provided by the trust deed or mortgage hereinafter mentioned. This bond is one of a series numbered consecutively from one to two thousand and six hundred, both inclusive, of which number twelve hundred are for the sum of one thousand dollars each

and fourteen hundred for the sum of five hundred dollars each, amounting in the aggregate to the sum of one million nine hundred thousand dollars, all of which are of like tenor, date, and effect, varying only as to appropriate numbers and amounts, and all equally secured by a trust deed or mortgage dated the first day of May, in the year one thousand eight hundred and seventy-
37 two, duly executed and delivered by the said railroad company and recorded in the proper offices in the States of Missouri and Kansas, and conveying to the said Jesse Seligman and John A. Stewart in trust the railroad of the said company, commencing at Pierce City, in the State of Missouri, and extending thence in Missouri, via Carthage, to the State line between Missouri and Kansas, and thence, via a route passing through or near Columbus and Oswego, to a point at or near Independence, in the State of Kansas, together with the rolling stock, equipments, appurtenances thereof, and all the franchises and privileges appertaining thereto, as more fully set forth in said trust deed or mortgage.

This bond is entitled to the benefit of a sinking fund as provided by said trust deed or mortgage, beginning on the first day of May, A. D. one thousand eight hundred and seventy-seven. This bond shall pass by delivery or by transfer on the books of the said railroad company in the said city of New York or in such other places in the United States and in Europe as said company may hereafter designate after a registration of ownership certified hereon by the secretary of the railroad company or its transfer agent. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer, the bond to be entitled to successive registrations and transfers to bearer at the option of each holder.

This bond shall not have become obligatory until it shall have been authenticated by a certificate endorsed hereon, duly executed by the trustees aforesaid, to the effect that the same is issued under and secured by the said mortgage.

In witness whereof the said Memphis, Carthage and Northwestern Railroad Company has caused these presents to be executed by its president and secretary and its corporate seal to be hereto affixed this first day of May, A. D. one thousand eight hundred — seventy-two.

[SEAL.]

—— ——, *President.*
—— ——, *Secretary.*

38 Each of which said bonds of the denomination of five hundred dollars is stamped with a United States internal revenue stamp of fifty cents, duly cancelled as required by law, and each of said bonds of the denomination of one thousand dollars with like stamp of one dollar, cancelled as aforesaid.

Now, therefore, this indenture witnesseth :

That for the purpose of securing and making more sure and certain the payment of the sums of money mentioned and provided for in the said bonds, bearing even date herewith, and each and every of them, with the interest thereon accruing after actual issue, according to the true intent and meaning thereof, and in consideration of the recited premises, the loan of said money, and the sum of one dollar to the said party of the first part in hand paid by the said parties of the second part at or before ensealing or delivery thereof, the receipt whereof is hereby acknowledged by the said party of the first part—

The Memphis, Carthage and Northwestern Railroad Company, the party of the first part aforesaid, has granted, bargained, sold, assigned, transferred, and conveyed, and by these presents does grant, bargain, sell, assign, transfer, and convey, unto the said Jesse Seligman and John A. Stewart, as trustees, the parties of the second part, and to their successor and successors in the trust and their heirs and assigns forever, all and singular the said railroad of said company constructed and to be constructed from the town of Pierce City, in Lawrence county, in the State of Missouri, and extending thence in Missouri via Carthage to the State line between Missouri and Kansas, and thence via a route passing through or near Columbus and Oswego to a point at or near Independence, in the State of Kansas, together with all and singular the lands, tracks, roadways, lines, rails, acquired or to be acquired, bridges, viaducts, culverts, ways, rights
39 of way, and materials, buildings, ferries and ferry boats, piers, wharves, erections, fences, walls, fixtures, privileges, easements, franchises, rights, and interests, railroad stations and depots, engine-houses, car-houses, and machine shops, and all other things, whether real or personal or mixed, now or hereafter belonging or appertaining to or acquired for the use or purposes of the above-mentioned line of railroad or for the use or operation thereof, whether now owned or hereafter to be acquired by the said party of the first part, and also all locomotives, engines, tenders, cars of every kind, carriages, rolling stock, materials, tools, and machinery now owned or hereafter to be acquired for the uses or purposes of or belonging to or appertaining to said line of railroad above mortgaged or conveyed in trust or connected with the proper equipment, operation, and conduct of the same, all of which personal chattels are hereby declared and agreed to be fixtures and appurtenances of the said railroad and are to be used and sold therewith and not separate therefrom and are to be taken as a part thereof, and all tolls, incomes, issues, and profits to be had or derived from the premises and property above mortgaged or from any part or portion of the same, together with all improvements made or to be made to the above-mentioned line of railroad or to any of the said properties, estates, or other things belonging thereto hereby mortgaged, and also all and every other estate, interest, franchise, right, property, or thing which the said party of the first part owns and holds or may or shall hereafter acquire or hold necessary or convenient for the use, occupation, and operation or enjoyment of its said railroad and appurtenances hereby mortgaged or any part or portion thereof, and also all rights or privileges to use the said road-beds, tracks, sidings, turn-outs, and switches constructed at the execution of

these presents or which may or shall be hereafter con-
40 structed for the convenient use of said railroad hereby mort-
gaged as fully and effectually as the said railroad company, the party hereto of the first part, is or may be by law entitled to have or acquire the same; to have and to hold all and singular the said railroad and appurtenances and other premises and property, real and personal, and rights, interests, and franchises above described and conveyed or intended so to be unto the said Jesse Seligman and John A. Stewart, trustees as aforesaid, and their successors in the said trust and to their heirs and assigns forever; but the same shall be, nevertheless, had and holden by such trustees for the uses and purposes and upon the trusts herein expressed and declared and for the equal, *pro rata* benefit and security of all and singular the holders for the time being of the above-mentioned twenty-six hundred bonds for the aggregate amount of nineteen hundred thousand dollars and of the coupons accompanying the same without preference or priority of any of said bonds over any of the others by reason of priority in the time of issue or negotiation thereof or otherwise: Provided always, and these presents are made and executed upon the express condition, That if the said party of the first part shall well and truly pay or cause to be paid to the holders of the said bonds intended to be secured hereby, each and every of them after the same shall be issued, the principal sums of money therein respectively mentioned at the maturity thereof, according to their true intent and meaning, with the interest accruing thereon at the time and in the way and manner therein provided, according to the true intent and meaning of the said bonds and of the coupons thereto attached and of these presents, then and from thenceforth this indenture and the estate hereby granted shall cease, determine, and be utterly void and of non-effect without any other release or formal reconveyance, re-entry, acknowledgment of satisfaction,
or any other act whatsoever: And provided further, That
41 until default shall have been made by the party of the first
part in due and punctual payment of the bonds by this indenture of mortgage secured, or some of them, or in the interest thereon accruing or some part thereof, or in the stipulated contributions to the said sinking fund hereby provided for, the said party of the first part shall be permitted to remain in the possession and operation of the said railroad and appurtenances and in the use and enjoyment of the things hereby mortgaged, and may take and retain the tolls, rents, issues, profits, and income thereof; and the said party of the first part doth hereby covenant and agree to and with the said party of the second part and to and with all persons and corporations who shall become or be holders of any of the bonds hereby secured that the said party of the first part shall and will faithfully and diligently appropriate and apply all the proceeds of its issue and negotiations of the said bonds, for nineteen hundred thousand dollars, to the construction, furnishing, and equipment of the said railroad and appurtenances hereby mortgaged and to acquiring and providing the other things embraced in and covered by the lien of this mortgage, and to no other use or purpose; and it is

hereby declared and agreed that the said trustees or their successors shall have full power, in their discretion, upon the written request of the party of the first part, to release from the lien and operation of this mortgage to the party of the first part or to persons designated by it any lands acquired or held for the purpose of stations, depots, shops, or other buildings or other purposes connected with said railroad or its uses, which in the judgment of the trustees shall be no longer necessary for use in connection with the said railroad, and shall have in fact become disused, or which may have been held for a supply of fuel, gravel, or other material and be no longer required therefor; and likewise any lands not occupied
42 by the track, which may have become disused by reason of a change of the location of any station-house, depot, shop, or other building connected with the said railroad, and likewise such lands occupied by the track and adjacent to such station-house, depot, shop, or other buildings as the said party of the first part may deem it expedient to disuse or abandon by reason of such change and a consent to any change and to such other changes in the location of the tracks, depots, or other buildings as shall have become expedient, and to make and deliver the conveyances necessary to carry the same into effect: Provided, That any lands which may be acquired for permanent use in substitution for any so released shall be conveyed to the trustees upon the trusts of these presents; but the same shall, nevertheless, without such conveyance, become and be, immediately upon the acquisition thereof, subject to the lien and operation of this mortgage and to all the provisions in this indenture contained, and the trustees shall also have full power to allow the said party of the first part from time to time to dispose of such portions of the equipment, machinery, and implements at any time held or required for the use of said railroad as may have become unfit for such use, replacing the same by new, which shall be conveyed to the trustees to be otherwise made subject to the operation of these presents in such form as the trustees shall require; but all such substituted or new equipment, machinery, or implements shall, nevertheless, immediately upon the acquisition thereof, become and be subject to the lien of this mortgage and to the operation of these presents without any conveyance or other contract.

And the said party of the first part hereby covenants and agrees to and with the said Jesse Seligman and John A. Stewart, their successor and successors in said trust and assigns, and to and with the holders for the time being of the said bonds, respectively,
43 that the said party of the first part will, at any time or times hereafter, upon the reasonable request of the said parties of the second part, their successors or assigns, execute and deliver, or cause to be executed and delivered, all and every such further and other reasonable deeds, conveyances, assignments, and assurances in the law for the better and more effectual vesting and confirming the premises hereby granted or intended so to be, and especially for conveying any property subsequently to date hereof acquired by the said party of the first part and comprehended in the description contained in these presents or intended to be covered by the lien

of this mortgage to the said parties of the second part, their successors and assigns, upon the trusts and for the uses and for the purposes of this indenture, as by said trustees or their successors or their counsel learned in the law shall be reasonably devised, advised, or required for the better effecting the objects and purposes of these presents; and, further, that the said party of the first part will do and perform all the things on the part of the said first party to be done and performed as hereinbefore as well as hereinafter set forth; and, further, that the said first party will pay unto the holder or holders of the said bonds, respectively, the said principal sums of money therein respectively mentioned and expressed therein, and the interest thereon as the same shall become due and payable.

And it is further provided, granted, declared, and agreed that in case of default in the payment of the interest on any of said bonds on any day on which the same become due and payable and the coupon or coupons for said interest shall have been presented and payment thereof be demanded at or after the day when the same shall be payable, and such default shall have continued for six months after such demand without the consent of the holder of
44 said coupon or bond, then and thereupon the principal of all
such bonds shall become immediately due and payable, and thereupon or in case of default in the payment of the principal of any of said bonds at maturity the said party of the first part shall and will, on demand made by the said parties of the second part, their successors or assigns, trustee or trustees for the time being, or their agents duly authorized in writing, assign and transfer in due form to them or to their agent or agents so authorized the actual possession of all the herein granted and conveyed property and premises herein recited and mentioned or intended to be embraced in this mortgage or deed of trust; and, further, that the expenses of taking, holding, and managing said property and premises, if possession shall be taken, shall be paid from the income and if necessary from the sale of the property and premises by the said trustee or trustees, as the case may be, for the time being; and, further, that in such case the parties of the second part, their successors in said trust and assigns, shall and may, by themselves or their officers and agents, take and receive, collect and have, the income and profits of the said railroad and other property, first applying the same to the payment and discharge of all current necessary operating expenses, replacements, and repairs, including the expenses hereinbefore mentioned and all taxes or other similar charges, and next to the payment of all sums of money due and payable for interest or principal upon the aforesaid bonds issued by said party of the first part and hereby secured, according to the tenor thereof, which payment shall be made with *pro rata* equality, without preference of any one bond or its coupons over any other bond or its coupons; and, further, that the said party of the second part, their successors in said trust or assigns, having entered, as hereinbefore mentioned, into the possession of the premises, property, and estate hereby conveyed, the said
45 default or defaults still continuing on without having actually

made such entry, provided there shall have been such continued default as under the foregoing provisions in that behalf would have authorized such entry or call for the delivery of such possession, the said parties of the second part or their successors shall be, and hereby are, fully authorized and empowered, at their discretion, to sell and dispose of to the highest bidder all and singular the railroad and appurtenances and other properties, rights, and franchises hereby mortgaged or conveyed or intended so to be, together with all benefits and equity of redemption of said party of the first part therein, at public auctions, in the city of St. Louis, in the State of Missouri, or in the city of New York, in the State of New York, as said trustees may elect, at such time as said parties of the second part may appoint, and also first having given at least sixty days' notice of such time and place of sale and a description of the property so to be sold by advertisement thereof in two papers, one published in the city of St. Louis, in the State of Missouri, and one published in the city of New York, and to adjourn said sale from time to time, in their discretion, and, if adjourned, to make such sale, in manner aforesaid, without further notice at the time and place to which it may be so adjourned, and as the attorney or attorneys of the first party, for that purpose by these presents duly constituted and appointed, make, execute, and deliver to the purchaser thereof a good and sufficient deed or deeds of conveyance in law for the same, granting and assuring to said purchaser or purchasers all such estate, right, property, franchise, and interests, and to the same extent as the said first party had therein at the date hereof or at any time subsequent, and also a good and sufficient transfer and assignment of said personal property and effects, and out of the moneys arising from such sale or sales to
46 retain and pay the costs and charges of advertisement of the said sale of the premises and the other expenses incident to the sale, and all other sums of money which said trustees or their successors in said trust may have necessarily or properly paid by reason of their taking possession of and operating said premises, and a reasonable allowance for their own services for legal professional advice and assistance in effecting and consummating said possession and sale, and also the principal and interest which shall then remain due and unpaid on said bonds remaining issued and outstanding and hereby secured as aforesaid for the benefit of and to be paid to the holders thereof, with *pro rata* equality, without preference of any one over another or others by reason of priority in the times of issue of any part thereof or otherwise, and then restore the residue of the said proceeds to the said party of the first part, and the said sale, when fully consummated, shall be a perpetual bar, both in law and equity, against the said party of the first part and all persons claiming or to claim the premises or any part thereof by, through, or under said party of the first part subsequent to the date of these presents. In case of the resignation, inability, failure, or refusal of any trustee to act, any court of competent jurisdiction may appoint a trustee to fill such vacancy on the application of the holders of at least one-sixth part of the bonds hereby intended

to be secured then outstanding, and such appointment shall invest
the trustee so appointed with all the interest, estate, power, and au-
thority in the premises and subject him or them to the same obli-
gations hereby given, granted, and assumed to and by the parties
of the second part; and it is hereby further provided, declared,
and agreed that the holders of a majority in amount of the
outstanding bonds issued under and secured by this indenture
may by instrument in writing, under the hands and seals
47 of themselves or their respective attorneys-in-fact thereto au-
thorized, remove from the trusteeship hereunder under any
trustee other than the original trustee herein named, whether such
existing substituted trustee shall have been appointed by a court as
last aforesaid or in any other manner, and may by the same instru-
ment appoint a new trustee in the place of the one so removed; and
such majority in amount of such bondholders may by like instru-
ment, executed in like manner, appoint a trustee to fill any vacancy
which may have been created in the trusteeship and which shall
not have been filled by appointment by a court as aforesaid, and
any appointment of a new trustee made by a majority in amount of
such bondholders in manner aforesaid in either of the cases afore-
said shall be valid and effectual, and such new trustee shall be vested
with the like estate, trust, powers, and duties as if he had been ap-
pointed by a court in pursuance of the foregoing provision in that
behalf; and, further, that in case of default in the payment of any
of the sums of money hereinafter stipulated to be paid to the trustee
for the purpose of forming a sinking fund for the redemption and
purchase of said bonds at the time or times when such sums of
money should be paid, according to the terms of this indenture, and
such default shall have continued for six months, then any such de-
fault shall have the same effect and be attended with like conse-
quences as would a failure or default to pay the principal or interest
of said bonds, as hereinbefore provided and set forth, and the trus-
tees are hereby empowered to proceed, in the event of such default,
to pay the said sums of money into said sinking fund as aforesaid
in the same manner and with like effect as in the event of the fail-
ure to pay the principal or interest of said bonds as aforesaid.

And the said party of the first part hereby further covenants and
agrees with the parties of the second part and their suc-
48 cessors and with the holder of each and all of the said issue of
one million nine hundred thousand dollars of bonds which
may be issued that the said party of the first part will create and
make a sinking fund for the redemption of such bonds and each of
them by setting aside and depositing with the said parties of the sec-
ond part or their successors in the trusts created by *these* indenture
of mortgage on the first day of May, A. D. one thousand eight hun-
dred and seventy-seven, and then on the first day of May, one thou-
sand eight hundred and seventy-eight, and thereafter annually on
each succeeding first day of May until the maturity of said bonds,
from the net earnings of the said railroad and property of at least
two per centum of the principal of the whole original issue of said
bonds. The moneys so to be paid to the said trustees shall be in-

vested by them in the purchase of said bonds secured hereby, provided that said bonds can be purchased at a price of not exceeding 110 per cent., being 10 per cent. premium on the par value, and said trustees shall give public notice in a newspaper of large circulation in the cities of St. Louis, New York, and Frankfort, Germany, that offers for the purchase of bonds will be received by them *of* the first day of March, 1877, and every first day of March annually thereafter; and the bonds so purchased are to be cancelled, and in case no bonds shall be offered or procurable at 110 or less, then said trustees shall invest said sinking fund in the bonds of the United States or in such other securities as the said railroad company may direct, and such investments and all reinvestments thereof and all income accruing therefrom shall belong to said sinking fund and be applicable in like manner as the said original contributions to the sinking fund, and such investments may be called in and changed from time to
time as the said railroad company may direct or approve, and
49 may be applied to the purchase of any of the bonds hereby
secured at any price which the said railroad company may approve, though higher than the price herein first limited therefor; and this indenture further witnesseth that these presents and the said bonds hereby secured or intended to be are made, executed, issued, and delivered upon the terms, conditions, and agreements—that is to say:

First. That the actual possession, use, management, and control of all the hereinbefore-granted estate, property, and premises shall be and remain in and with the said party of the first part so long as the bonds so issued shall be or remain without default or forfeiture and so long as default shall not be made in paying to the party of the second part all sums of money for the use and benefit of said sinking fund as hereinbefore stipulated to be paid.

Second. That the said bonds, with the countersigning of the trustees thereon, shall be issued and negotiated from time to time at a rate not exceeding seventeen thousand five hundred dollars for each mile of railroad hereby mortgaged, and in case of the issue and negotiation of such bonds faster than or in advance of that rate upon the number of miles of such railroad actually constructed the proceeds of such bonds so issued and disposed in advance of such construction shall be deposited with the trustees under this mortgage or with the bankers negotiating for the said company in the sale of such bonds, or with other bankers approved by the trustees under this mortgage, to be by such trustees or bankers paid over to said company from time to time at the rate per mile aforesaid, upon such trustees or bankers being furnished with engineer's certificates of the completion of portion of such railroad in anticipation of the construction whereof such bonds shall have been issued and disposed of; and it is further understood and agreed by and between the parties to these presents that the said parties of the second part,
their successor or successors in said trust, shall only be ac-
50 countable for reasonable diligence in the management thereof,
and shall not be responsible for the acts of each other to which they do not severally assent; and this indenture further witnesseth

that the said parties of the second part hereby accept the aforesaid trust, and also severally covenant and agree to and with the said party of the first part to execute the same upon the terms and conditions hereinbefore mentioned and provided, and which said terms and conditions are hereby mutually agreed to and upon by both of the parties to these presents.

In testimony whereof the said party of the first part, in *the* pursuance of the authority given by law and in conformity with the order of the board of directors, has caused this indenture to be signed by Leonidas P. Cunningham, its president, and Edwin H. Brown, its secretary, and the corporate seal of the said railroad company to be affixed hereto, and the parties of the second part have hereunto set their hands and seals the day and year first in this indenture written.

[Seal M., C. & N. W. R. R. Co.]

LEONIDAS P. CUNNINGHAM, *President.*
EDWIN H. BROWN, *Secretary.*
JESSE SELIGMAN, [SEAL.]
JOHN A. STEWART, [SEAL.]
Trustees.

STATE OF MISSOURI, }
County of Jasper, } *ss:*

On the first day of May, A. D. one thousand eight hundred and seventy-two, before me, the undersigned, a notary public in and for said county, personally came Leonidas P. Cunningham, the president, and Edwin H. Brown, the secretary, of the Memphis, Carthage and Northwestern Railroad Company of the States of Missouri and Kansas, with each of whom I am personally acquainted, who,
51 being by me severally and duly sworn, doth each for himself depose and say that both of them reside at the city of Carthage, in the county of Jasper, in the State of Missouri; that he, the said Leonidas P. Cunningham, is president of the said railroad, and he, the said Edwin H. Brown, is the secretary of said company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was thereto affixed by the order of the board of directors of said company; that the said Leonidas P. Cunningham signed his name thereto by the like order as president, and that the said Edwin H. Brown signed his name thereto by the like order as secretary, of said company.

In testimony whereof I, the said notary public, have hereunto set my hand and affixed my notarial seal, at office, in said county and State, on the day and year last above written.

[NOTARIAL SEAL.] B. F. GARRISON,
Notary Public.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this first day of May *May,* A. D. one thousand eight hundred and seventy-two, before me, the undersigned, a notary public in and for said city and county, personally came Jesse Seligman and John A.

Stewart, *which* each of whom I am personally acquainted and known to me to be *the* two of the persons described in and who executed the foregoing instrument, who, being by me severally and duly sworn, doth each for himself depose and say that both of them reside in the city of New York, in the State of New York, and are the trustees named in the above and foregoing mortgage and deed of trust, and severally acknowledged that they executed the same as their voluntary act and deed for the uses and purposes therein mentioned.

52 In testimony whereof I, the said notary public, have hereunto set my hand and affixed my notarial seal, at office, in the said city and county of New York, on the day and year last above written.

[NOTARIAL SEAL.] THEO. M. LILIENTHAL,
Notary Public.

The foregoing mortgage was filed for record in this office on the 10th day of May, 1872.

[Seal of the Recorder of Deeds, Jasper County, Mo.]

JOSIAH LANE, *Recorder.*

(Hereto attached the following:)

STATE OF MISSOURI, } *ss:*
County of Jasper, }

I, John W. Burch, recorder of deeds in and for said county, hereby certify that the above is a true copy of the original trust deed as the same appears of record in Mort. Record "G," page 450, &c., in my office.

Witness my hand and seal. Done at office, in Carthage, Mo., this 30th day of January, 1882.

[Seal of the Recorder of Deeds, Jasper Co., Mo.]

JOHN W. BURCH, *Recorder.*

Said Baker next offered in evidence and read certified copy of deed from Jesse Seligman and John A. Stewart as trustees to Joseph Seligman and Josiah Macy, Jr.; which said deed is in the words and figures following, to wit:

Deed from J. Seligman & J. A. Stewart, Trustees, to Jos. Seligman & Josiah Macy, Jr.

This indenture, made the fourth day of January, in the year one thousand eight hundred and seventy-five, between Jesse Seligman and John A. Stewart, both of the city of New York, as trustees under the mortgage or deed of trust executed by the Memphis, Carthage and Northwestern Railroad Company, dated the first day of May, eighteen hundred and seventy-two, and recorded as hereinafter mentioned, parties of the first part, and Joseph Seligman and Josiah Macy, Junior, both of the city of New York, parties of the second part*ies*. 53

Whereas the said The Memphis, Carthage and Northwestern Railroad Company, a corporation duly formed and existing under the laws of the States of Missouri and Kansas, by its mortgage or deed of trust, bearing date the first day of May, one thousand eight hundred and seventy-two, and recorded in the office of the recorder of deeds in and for the county of Jasper, in the State of Missouri, in Book "G," on page 535, and in the office of the register of deeds in and for the county of Cherokee, in the State of Kansas, and elsewhere, conveyed to the said Jesse Seligman and John A. Stewart the railroad and franchise and rights and property hereinafter described—

To have and to hold the same unto the said Jesse Seligman and John A. Stewart and their successors, heirs, and assigns forever upon certain trusts for the equal *pro rata* benefit and security of the holders of the bonds therein mentioned and of the coupons accompanying the same in said deed particularly expressed, by which deed of trust it was, among other things, provided that in case of default in the payment of the interest on any of said bonds on any day on which the same should become due and payable, and the coupon or coupons for said interest should have been presented and payment thereof demanded at or after the day when the same should be payable, and such default should have continued for six months after such demand without the consent of the holders of said coupon or bonds, then and thereupon the principal of all such bonds should become immediately due and payable, and 54 thereupon, the said default or defaults still continuing, the said Jesse Seligman and John A. Stewart, the parties of the second part to said mortgage or deed of trust, or their successors should be, and they — thereby, fully authorized and empowered, at their discretion, to sell and dispose of, to the highest bidder, all and singular the railroad and appurtenances and other property, rights, and franchises by said deed conveyed, together with all benefit and equity of redemption of the said The Memphis, Carthage and Northwestern Railroad Company therein, at public auction, in the city of St. Louis, in the State of Missouri, or in the city of New York, in the State of New York, as said trustees might elect, at such time as said trustees might appoint, first having given at least sixty days' notice of such time and place of sale and a description of the property so to be sold by advertisement thereof in two newspapers, one published in the city of St. Louis, in the State of Missouri, and one published in the city of New York, in the State of New York, and to make, execute, and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same, granting and assuring to said purchaser or purchasers all such estate, right, property, franchises, and interests, and to the same extent as the said The Memphis, Carthage and Northwestern Railroad Company had therein at the date of said deed of trust, and also a good and sufficient transfer and assignment of said personal property and effects;

And whereas default having been made in the payment of the interest coupons attached to the bonds secured by said deed of trust, which matured respectively on the first day of November,

one thousand eight hundred and seventy-two, and on the first day of May, one thousand eight hundred and seventy-three, and on the first day of November, one thousand eight hundred and seventy-
55 three, and on the first day of May, one thousand eight hun-
dred and seventy-four, and such coupons and the interest thereon remaining unpaid, and the coupons for the interest due on twenty of said bonds on the first day of November, one thousand eight hundred and seventy-two, and on the first day of May, one one thousand eight hundred and seventy-three, having been presented to the said railroad company for payment and payment thereof demanded after the same became due and payable, and such default in the payment thereof having continued for more than six months after such demand and still continuing without the consent of the holders of said coupons or of the bonds from which the same were cut, the said parties of the first part did, on the fourth day of January, one thousand eight hundred and seventy-five, in pursuance of said provisions of said deed of trust in that behalf and of the written request to such effect of the holders of the greater portion of all the outstanding bonds and coupons secured by said mortgage or deed of trust, sell all and singular the said road and franchise and all rights and property hereinafter described, at public auction, in the city of New York, in the State of New York, having first and after the expiration of such six months after such demand and default given at least sixty days' notice of the time and place of such sale, such notice containing also a description of the property so to be sold, by advertisement in two newspapers, one published in the city of St. Louis, in the State of Missouri, and one published in the city of New York, in the State of New York, at which sale the said property was duly struck off and sold to the said parties of the second part for the sum of fifty thousand dollars, they being the highest bidders and that being the highest sum bidden for the same:

Now, therefore, this indenture witnesseth:

That the said parties of the first part, in order to carry into effect the said sale so made by them as aforesaid, in pursuance
56 of the provisions of the said mortgage or deed of trust in that
behalf, and in consideration of the premises and of the said sum of fifty thousand dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and conveyed, and by these presents do grant, bargain, sell, assign, transfer, and convey, unto the said parties of the second part and to their heirs and assigns forever all and singular the railroad of the said The Memphis, Carthage and Northwestern Railroad Company at the date of said mortgage or deed of trust constructed or since constructed from the town of Pierce City, in Lawrence county, in the State of Missouri, and extending thence in Missouri via Carthage to the State line between Missouri and Kansas, and thence by a route passing through or near Columbus and Oswego to point at or near Independence, in the State of Kan-

sas, together with all and singular the lands, tracks, roadway, lines, rails, acquired and to be acquired, bridges, viaducts, culverts, ways, rights of way, and materials, buildings, fences, and ferry-boats, piers, wharves, erections, fences, walls, fixtures, privileges, easements, franchises, rights, and interests, railroad stations and depots, engine-houses, car-houses, and machine shops and all other things, whether real or personal or mixed, at the date of the said mortgage or deed of trust or thereafter belonging or appertaining to or required for the use or purposes of the above-mentioned line of railroad or for the use or operation thereof, whether owned by the said The Memphis, Carthage *or* Northwestern Railroad Company at the date of the said mortgage or deed of trust or since acquired by the said company, and also all locomotives, engines, tenders, cars of every kind, carriages, rolling stock, materials, tools, and machinery owned
57 by said company at the date of said mortgage or deed of trust or since acquired for the uses or purposes of or belonging to or appertaining to said line of railroad by said deed mortgaged or conveyed in trust or connected with the proper equipment, operation, and conduct of the same, and all tolls, incomes, issues, and profits to be had or derived from the premises and property by said deed of trust mortgaged or from any part or portion of the same, together with all improvements made to the above-mentioned line of railroad or to any of the said properties or estates or other things belonging thereto by said deed mortgaged.

And also all and every other estate, interest, franchise, right, property, or thing which the said The Memphis, Carthage and Northwestern Railroad Company owned and held at the date of said mortgage or deed of trust or has since acquired or held necessary or convenient for the use, occupation, operation, or enjoyment of the said railroad and appurtenances by the said deed of trust mortgaged, or any part or portion thereof, and which was by the said deed mortgaged; and also all rights and privileges to use the said road-beds, tracks, sidings, turn-outs, and switches constructed at the execution of said deed of trust or since constructed for the convenient use of the said railroad as fully and effectually as the said railroad company was at the date of said deed of trust or has been since by law entitled to have or acquire the same:

To have and to hold all and singular the above described and granted railroad, rolling stock and appurtenances, premises, properties, franchises, rights, and things, with the appurtenances, unto the said parties of the second part, their heirs and assigns, to their own use, benefit, and behoof forever.

And it is hereby expressly understood, provided, and declared that nothing herein contained shall be so construed as to create
58 any personal covenant or obligation, express or implied, on the part of the said parties of the first part or either of them.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

JESSE SELIGMAN, [SEAL.]
JOHN A. STEWART, [SEAL.]
As Trustees.

Sealed and delivered in presence of—

(The words "in the State of New York," on the third page, and the words "or since constructed," on fifth page, having been interlined and the word "and," on fourth page, having been erased, all before execution.)

HENRY E. WOODWARD.

STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Henry E. Woodward, a notary public in and for the State of New York, duly commissioned and sworn, and dwelling in the city of New York, do hereby certify that on this nineteenth day of March, in the year one thousand eight hundred and seventy-five, in the said city of New York, before me personally appeared Jesse Seligman and John A. Stewart, trustees, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as parties thereto and to be the same persons described in and who executed the said instrument, and severally acknowledged to me that they subscribed and executed the same and severally duly acknowledged to me the execution of the same.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, in the city of New York, the day and year last above written.

[L. S.] HENRY E. WOODWARD,
Notary Public (195, *N. Y. County*).

59 The foregoing deed was filed for record, in this office, on the ninth day of June, A. D. 1875, at nine o'clock and forty minutes a. m.

JAMES A. BOLM, *Recorder*,
By L. E. STEINMETZ, *Deputy*.

STATE OF MISSOURI,
County of Jasper, } *ss:*

I, John W. Burch, recorder of deeds in and for the county and State aforesaid, hereby certify that the foregoing is a true and correct copy of the trustees' deed from Jesse Seligman and John A. Stewart, of the Memphis, Carthage and Northwestern railroad, to Joseph Seligman and Josiah Macy, Junior, of the city of New York, as the same appears of record in Book 34, pages 279, 280, 281, & 282, Deed Records, Jasper county, Missouri.

In testimony whereof I have hereunto set my hand and affixed the seal of said office this April 2nd, A. D. 1879.

[SEAL.] JOHN W. BURCH,
Recorder of Deeds.

He then offered in evidence and read the deposition of James Baker, which is in words and figures as follows, to wit:

Deposition of —— ——.

JAMES BAKER, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

Direct examination by Mr. HARDING:

1 Q. State your name and residence.

A. My name is James Baker. I reside in Springfield, Missouri.

2 Q. Were you the James Baker upon whom service of summons was made in this case?

A. Yes, sir; I think so.

3 Q. And on whose behalf, on the motion to quash, the service was made?

A. Yes, sir.

4 Q. I will ask you if you were at any time president of the Memphis, Carthage and Northwestern railroad?

A. I was.

60 5 Q. State in that connection when it was.

A. I first became president in 1873, as I recollect.

6 Q. State, if you know, when the last election of directors of that company took place by the stockholders.

A. The last election of directors by the stockholders took place in March, 1874.

7 Q. About that time were you re-elected president?

A. I was re-elected president.

8 Q. After that election how long did that corporation continue to operate the railroad known as the Memphis, Carthage — Northwestern railroad—up until what time?

A. According to my best recollection, the directors instructed me the first of October or early in October of that year when to turn the road over to the trustees in the mortgage.

9 Q. Look at that paper and state what that is (paper shown to the witness, marked Exhibit A by the notary and attached to this deposition).

A. I have no doubt but what that is a copy. I remember the substance of it.

10 Q. These resolutions were adopted at a meeting of the board of directors on the first of October, 1874, were they?

A. Yes, sir; I have no doubt of it. I know it was in October, and I have no doubt the date there is correct.

11 Q. State whether the board of directors of that corporation ever held a meeting after that time.

A. They never did.

12 Q. In pursuance of these resolutions, did you do anything; and, if so, what?

A. In pursuance of these resolutions I turned the road over to the trustees in the mortgage—Jesse Seligman and John A. Stewart.

13 Q. How soon after the passage of these was that done?

A. I am confident it was done within a month; just how long I don't remember.

61 14 Q. After that did that corporation as a corporation ever do any business of any account after you turned the road over?

A. It never did.

15 Q. What property and effects did you turn over? If you cannot itemize or mention particular things, state the articles and everything called for in the mortgage. I suppose that would be sufficient.

A. The mortgage, as I remember it, included all the property of the corporation and all of its franchises.

16 Q. Monies, credits, and everything?

A. Yes, sir.

17 Q. Earnings and tools?

A. I undertook to and did turn over everything, and I issued a notice to the employees of the corporation giving them notice of that fact.

18 Q. Did the company continue in any place of business whatever after that time?

A. It never did; had no place of business.

19 Q. Did it ever keep any records or books of account after that time of any kind?

A. It never did.

20 Q. Did you ever act or attempt to act in any way as an officer of the company after that time?

A. I never did; always denied it.

Cross-examination by Mr. BOTSFORD, counsel for plaintiff:

1 X Q. You say in your examination-in-chief that in the return on the motion to quash the service you permitted the use of your name?

A. Yes, sir.

2 X Q. What do you mean by that?

A. I mean that as an honorable man I felt under obligations to have this case presented to the court fairly in all its points.

3 X Q. Who asked permission to use your name?

A. I think the counsel for the defendants in this case—the counsel representing this motion.

4 X Q. Do you mean Col. Broadhead and Mr. Harding?

A. I do. One or the other; perhaps both.

62 5 X Q. Did you grant them permission to use your name?

A. I did, and I gave it in writing, as I recollect.

6 X Q. As representing whom did they ask your permission—the corporation defendant, or who if not the corporation defendant?

A. I don't remember who they were representing at that time.

7 X Q. Whom did you understand them to represent in making the application for your permission?

A. There were a number of suits in respect to that property, and in some of them Messrs. Broadhead and Harding were engaged, and they asked me to allow my name to be used, and I thought it was perfectly right, and I think so yet, and I stand by it, too, for that matter, that I should do it.

8 X Q. I don't question that; I wish to get the facts.

A. I gave the privilege.

9 X Q. Is that all you want to say?

A. That is all I can say, for the reason that I don't remember the suits, but I know there were several.

10 X Q. What I desire to know, Judge Baker, is whom you understood these gentlemen to represent in making the application to you for permission to use your name?

Counsel for the defendant objected to these questions as to what Judge Baker's understanding was.

A. Well, I am quite sure, among others, they represented Mr' Seligman of New York, or the firm of J. & W. Seligman & Co. of New York, but who else they represented I don't remember.

11 X Q. Did they claim to represent the defendant corporation?

A. I don't remember whether they did or not; I think not.

12 X Q. Don't you know they have not represented it since, if they ever did before—since the time you mention, when you turned over the property?

A. I don't think anybody ever represented it since that time, because I understood it went out of existence and they had no use of any representation.

63 13 X Q. What relation did the firm of Seligman & Co., whom you say these gentlemen represented, bear to the defendant corporation?

A. They, among other gentlemen, had loaned that corporation considerable money, and they held its bonds for seven or eight hundred thousand dollars, and it was in payment of these bonds the property was turned over to the trustee.

14 X Q. Did that firm bear any other relation to the corporation than the one you have named?

Witness: Put your questions more direct, and I will try and answer them.

15 X Q. Did they hold any stock in the corporation defendant at or prior to the time when you turned over this property?

A. My understanding was that they held stock in hypothecation for that same debt that they held the bonds for, but were not direct stockholders in the corporation.

16 X Q. In what amount was stock issued to them?

A. Probably near six millions—more than half the stock.

17 X Q. Was a certificate issued and delivered to them for that amount?

A. I know from the books and perhaps from correspondence that it was, and it stated the purpose and object of the delivery. That is my understanding and belief; it stated the purpose of it. It is possible I am mistaken. I knew at the time better than I can now remember, but that is my understanding in regard to it.

18 X Q. What was the authorized capital of the company?

A. I think it was ten millions.

19 X Q. Whom did these gentlemen, Col. Broadhead and Mr. Harding, represent in the suits to which you have reference?

A. Among others they represented J. & W. Seligman & Co.

20 X Q. I will now call your attention to page 21 of the evidence in the case of Burgess *vs.* Seligman and ask you to examine the
certificate of stock of the Seligmans there, and then say
64 whether you are not mistaken in your recollection that the
certificate showed that the stock was issued in pledge.

A. Of course it is impossible for me to remember exactly all these transactions. The certificate book itself with the stubs on it became lost one way or another; some of the gentlemen took it out of my control, but my recollection is that the stub book on the stock certificate book shows how this stock was issued, and I conclude from that as much as any other source that the certificate itself showed.

21 X Q. Is the language of that certificate stated here, namely, "This is to certify that J. & W. Seligman & Co. are entitled to sixty thousand shares of one hundred dollars each — capital stock of the Memphis, Carthage & Northwestern Railroad Company, transferable only on the books of the company in person or by attorney on the surrender of this certificate." Is that correct, according to your best recollection?

Counsel for the defendant objected to the question as not being cross-examination and not pertinent to the issue on this motion.

A. I presume it is, though I can't remember; but there were other entries on the books that show that it was held (one of them did, particularly)—that it was held in escrow, and another entry, as I recollect it, showed they held it in trust. I knew the fact in a general way, because I represented, in a certain sense, these parties who loaned the money—that they did hold it that way; and also from the contracts of one kind and another that came into my possession.

22 X Q. You say you represented the Seligmans?

A. I did not say that.

23 X Q. You say you represented these parties in a certain sense.
Please explain so as to see what you mean by that—how
65 you came to represent them, and when.

A. J. & W. Seligman & Co. and Macey & Sons, Brown, Wadsworth & Co., and Perkins, Livingston & Post had advanced large sums of money to this corporation and held those bonds, and at their instance I became the president of the corporation and took control and managed it for awhile, and I found it was absolutely insolvent, and myself and other directors thought it was an honest thing for us to do to turn the property over to the trustees, and in that sense I represented these gentlemen.

24 X Q. Had you in any way been connected with this corporation prior to your election as president, in 1873?

A. I never was.

25 X Q. Had you been a stockholder in it?

A. Not at all.

26 X Q. Did you ever become a stockholder in it?

A. I held two or three shares, perhaps; enough to qualify me as a director.

27 X Q. From whom did you receive your stock?

A. I am not positive, but I think Ed. Brown transferred it to me.
28 X Q. Did you pay anything for it?
A. I did not.

Counsel for the defendants objected to all of the foregoing questions as incompetent and irrelevant.

29 X Q. Was this before or after you became the representative of these firms who held these securities of that company that you became a stockholder and was elected president?

Objected to as incompetent.

A. Immediately afterwards.
30 X Q. I understand you to say, Judge Baker, that you became president in the interest of these parties and at their instance and request and as a part of your employment in their behalf; is that so?

Objected to as incompetent.

A. I became the president at their request, but I never was employed and never received a cent for that service, but I was
66 their friend.

31 X Q. Did you receive compensation from those firms for the services you performed in their behalf in the corporation?

Objected to as before.

A. I never received a cent; never charged a cent and never received a cent.
32 X Q. Did you receive any compensation as president of the company by way of salary?

Objected to as before.

A. I don't believe I did. I am not absolutely positive, but I don't believe I did.
33 X Q. Was this six millions of stock voted at the several elections at which you were elected president, in 1873 and 1874?

Objected to as before.

A. In 1873, when I first became president, I was put in the board by the resignation of one of the then directors, and was made president. At the election in 1874 my recollection is that it was voted; but it was not necessary to an election that it should be. The stock was unanimously voted for the board. After some consultation we concluded to allow that to be voted.
34 X Q. Do you remember the number of shares besides the Seligman stock that was voted at that election?
A. I do not remember the number. They were not very great, though; perhaps not exceeding one hundred shares, if that.
35 X Q. The shares were one hundred dollars apiece?
A. Yes, sir.
36 X Q. Did you have any personal interest or did you ever have any personal interest in this corporation aside from that which you have already explained?

A. I never did.

37 X Q. You have no interest in it now?

A. Not any.

38 X Q. You never had any relation to the defendant corporation except the one which you explained?

A. None whatever.

67 39 X Q. I will ask you to state who were the directors of the defendant corporation in October, 1874.

A. Myself, R. W. Wright, A. A. Talmage, C. W. Rogers, Ezra Miller, and two others whose names I can't remember just now.

40 X Q. Was either of the Seligmans one of the other two directors?

A. I am not sure.

41 X Q. What is your best recollection of it?

A. At one time one of them was, but I can't remember whether it was at that time or not. There were two New York parties elected, and I think they both resigned, but I am not quite sure.

42 X Q. Were these two gentlemen directors during any part of the time you served actively as president?

A. Yes, sir.

43 X Q. During which part of the time, according to your best recollection?

A. I think they were elected in March, 1874. I am sure they neither ever acted, and my recollection is that afterwards they resigned and other persons were put in, but I can't remember quite positive. It is too long since.

44 X Q. Was the election in March, 1874, the annual one for that year?

A. Yes, sir.

45 X Q. Was that the last election of officers of that company?

A. Yes, sir.

46 X Q. Were you elected president in March, 1873?

A. No, sir.

47 X Q. Were these two New York gentlemen directors prior to March, 1874?

A. I don't think they were. It is possible, however.

48 X Q. Are these gentlemen who you say were directors from March, 1874, and following still living?

A. I presume so.

49 X Q. I see that R. W. Wright appears in Exhibit A as vice-president. Where did he reside?

A. At Oswego, Kansas.

50 X Q. How did it happen that a gentleman residing at Oswego, Kansas, was a director and vice-president of this corporation?

68 A. The line of road as contemplated extended from Pierce City, in Missouri, to Oswego, in Kansas, and the grading was pretty much done from Brownsville, the then terminus of the road, to Oswego.

51 X Q. Did the line of road of this company extend from Pierce City to a point in Kansas?

A. Yes, sir.

52 X Q. Under what charter of corporation?

A. Under, perhaps, two charters—one granted in Missouri under the general laws and one in Kansas under the general laws, under consolidation.

Counsel for defendant objected on the ground that there is a record by which these matters can be proved.

53 X Q. How was this company organized?

A. It was organized under the general laws of Missouri and the general laws of Kansas, as I remember.

54 X Q. By consolidation?

Objected to as heretofore; the record will show.

A. Yes, sir; I believe so; I am not quite positive of it.

55 X Q. Consolidation of what companies? What were the names of the companies?

Objected to as being a matter of record.

A. The company as formed was known as the Memphis, Carthage & Northwestern Railroad Company.

56 X Q. To build a line between what points?

A. Between Pierce City, in Missouri, and Oswego, in Kansas.

57 X Q. Are you speaking of the defendant corporation?

A. I am.

58 X Q. What I desire to know is, Judge Baker, the names of the companies that became consolidated and that made, after consolidation, the defendant corporation.

A. I don't remember what their names were.

59 X Q. Was one corporation a Missouri corporation and the other a Kansas corporation?

A. I believe so.

69 60 X Q. Was the Missouri corporation authorized to build from Pierce City west of the State line of Missouri in Arkansas?

Objected to as being a question of law.

A. I am not sure; perhaps it was.

61 X Q. What was the name of the Missouri corporation that was consolidated?

A. I only remember that the name of the corporation that had a road completed, extended into Kansas and twenty-odd miles more graded, was the Memphis, Carthage & Northwestern Railroad Company. The particulars of their organization I do not remember, but believe that it was as I described. These were matters that took place before I had anything to do with it.

62 X Q. That is, the consolidation did?

A. Yes, sir; the organization; the work.

63 X Q. I will ask you if you don't remember the consolidation was made by the uniting of the Missouri corporation authorized to build the road from Pierce City to the State line and the Kansas corporation, known as the State Line, Oswego and Southern Kansas Railroad Company, organized under the laws of Kansas to build a road from the State line west to Oswego and onward?

Objected to as a matter of record entirely.

A. That may be true; perhaps is; but it happened before I had anything to do with the road, and I can't remember the names nor the particulars of the organization.

64 X Q. Exhibit A shows that the meeting of the board of directors at which the resolution you have referred to was passed was held in the city of St. Louis. Please explain how that occurred.

A. After I became president of the company I wanted the directors' meetings where I lived, and I lived in St. Louis.

65 X Q. During what period?

A. During all the time I was president of the company.

66 X Q. Were the meetings of the board of directors while you were president held in your office, in St. Louis?

A. They were.

67 X Q. All of them?

A. All that were held in St. Louis.

68 X Q. I mean all the meetings of the board of directors. Were they held at your office, in St. Louis?

A. All that were held in St. Louis were. There was a meeting or two at Carthage before I had the office removed.

69 X Q. Before you had the office removed?

A. To St. Louis. All the meetings held were held in my office.

70 X Q. What office was removed to St. Louis?

A. What we call the general office of the corporation. The meetings were held here in St. Louis in that office, and there the books of the corporation—I mean the minute books and general records—were kept.

71 X Q. During the time of your presidency?

A. Yes, sir.

72 X Q. And after the removal?

A. After the removal; yes, sir.

73 X Q. How long after the commencement of your presidency was it before the removal of the general office was made here?

A. Perhaps two or three months.

74 X Q. Exhibit A shows that the meeting was held at the office of the Atlantic and Pacific Railroad Company. Please explain how that happened.

A. I was the general attorney of the Atlantic and Pacific Railroad Company and occupied the chief office in their general office, and in my room the meetings were held.

75 X Q. That is, in your room as attorney?

A. Yes, sir. It was also what was known as their directors' room. I had two rooms adjoining, and occupied that.

76 X Q. The directors' room for the Atlantic & Pacific Railroad Company?

A. Yes, sir.

77 X Q. And it was in that office, I understand, in which all the meetings of the board of the defendant corporation held in the city of St. Louis were held?

A. Yes, sir.

71 78 X Q. What books of the defendant corporation were brought to your office, in St. Louis, when the removal to which you have referred was made? Please specify them as fully as you can.

A. I don't remember exactly, but the minute book.

79 X Q. The minute books of what proceedings?

A. The minute books of the proceedings of the board of directors.

80 X Q. And stockholders also?

A. Yes, sir; what purported to be a stock ledger and a book of certificates with the stubs, and perhaps other books that I can't name now.

81 X Q. Did you aim, in making the removal, to bring all of the general books of the corporation, including the stock books and the book for the transfer of the stock shares and the other books of the corporation?

A. To the best of my recollection, I wrote to the gentleman in charge, the superintendent, to send the books to me in St. Louis by express, and it was done, but without including the account books and all those things that pertain to the operation of the road. The rest of the books were sent.

82 X Q. Did those books embrace the book in which customarily and under the law transfers of shares of stock are made?

A. They did.

83 X Q. And also the stock ledger itself?

A. They did, as I believe.

84 X Q. I understand you to say that the minute books were the records of the corporation—proceedings of the board of directors and stockholders?

A. Yes, sir.

85 X Q. And I understand you to say that all the books except those in which the accounts of the corporation were kept were sent?

A. Well, it requires a little explanation, probably. The business transaction between the corporation and the public was, of course,
under the control of the superintendent and cashier there, and
72 all these books were kept there; the other books, those
pertaining to the corporation and the proceedings of the board of directors and stockholders and general corporation matters, were sent to me.

86 X Q. Where were those books kept after you received them at St. Louis?

A. They were kept in my office.

87 X Q. As attorney of the Atlantic & Pacific railroad?

A. Yes, sir.

— X Q. And where those meetings were held?

A. Yes, sir; and until I ceased to be attorney of the road. Then I left them in the vault of the company for a time.

88 X Q. Please give the date when you ceased to be attorney of the road, merely to fix the time when you put them in the vault.

A. I ceased to be attorney of the Atlantic & Pacific Railroad Company in 1876—early in 1876.

89 X Q. And thereupon these records were left in the vault of the Atlantic & Pacific Railroad Company in that office?

A. Not then, but some time afterwards.

90 X Q. You may state how long they continued in this vault, if you know.

A. Several years, except when I submitted them to the inspection of any gentleman that wanted to see them or gave directions to have it done. Any gentleman that had business with the corporation who wanted to see the book had liberty to see them.

91 X Q. You gave them permission?

A. I gave the auditor of the St. Louis & San Francisco Railroad Company direction to allow them to be inspected.

92 X Q. How many times do you say that after they were placed in the vault and during what years did people have occasion to examine those records as you have stated?

A. I have no idea about the number of times people examined
them. I gave one direction and have no question but what it was
always obeyed. I gave our auditor directions to allow any
73 attorney that wanted to see these books to allow them to see
them.

93 X Q. Any attorney of whom?

A. Any attorney in regard to this property in any shape who wanted to see them, and he always allowed it to be done.

94 X Q. During what years was the applications made to you to see the books and permission granted, as you have stated, to inspect them?

A. Commencing, perhaps, 1877 or 1878. Every once in awhile some attorney would come to me about the books, and I would tell them where to go to see them, and they would go to see them; I suppose they did. I never refused anybody the privilege. In fact, I didn't care anything about it.

95 X Q. I don't quite understand you yet, whether you gave a general direction to the auditor to let anybody that should come there to see them, or whether you gave the order in each particular instance.

A. No, sir; a general order. I told him if anybody came to see these books to let him see them, and applications were made there after that, and not to me, except where he wouldn't know anything about it, and then they would come to me.

96 X Q. Are those books still in the vault?

A. No, sir.

97 X Q. Where are they?

A. A portion, I presume, are in Gov. Fletcher's office here, and a portion have been taken away by a gentleman who called to see them and never returned them. I don't know who took them; have no idea what became of them, but they are not all there.

98 X Q. Are any of them still in the vault?

A. None in the vault.

99 X Q. Who first took them away from the vault?

A. I think that the porter at the railroad office brought them over to number 20 when I was occupying an office, but I am not quite sure about little details of that kind.

100 X Q. No. 20?

A. No. 20 North 4th street.

74 101 X Q. Was that where you had your office after you ceased to be attorney of the Atlantic & Pacific Railroad Company?

A. Yes, sir.

102 X Q. Were all the books taken from the vault to your office?

A. All that were left there that had not been abstracted.

103 X Q. Please state, as nearly as you can recollect, the specific books that were taken from the vault to your office.

A. The minute book, in which the proceedings of the directors and stockholders were kept; a book purporting to be a stock ledger, and one other book which I have no name for; the stock certificate book was gone, and another book was gone which used to be in my custody.

104 X Q. Was the book containing the transfer of shares among the books taken to your office?

A. The stock ledger was taken to my office and is there yet, I think, but the book of certificates—the certificate book and stubs is gone. Somebody carried it off. The stock ledger is what you probably call the transfer.

105 X Q. This office, No. 20, I understand you, was your law office?

A. Yes, sir; it was.

106 X Q. Is it your law office still?

A. It is not.

107 X Q. Since when had it ceased to be your law office?

A. About the first of June last.

108 X Q. Are these books still in that law office?

A. I presume they are. They were when I last saw them.

109 X Q. Who occupied that office with you when you occupied it, if any one?

A. Gov. Fletcher.

110 X Q. Who occupies it now?

A. Gov. Fletcher, Mr. Crews, and Mr. Napton.

111 X Q. Did you remove all your books away from the office in June last, when it ceased to be your office?

A. I did not.

75 112 X Q. Do you still retain any effects in the office? And, if so, tell us in a general way what they are.

Objected to as incompetent.

A. I have some books there and some book-cases—some law books.

113 X Q. You spoke of some of the books being elsewhere than in this office; you may state, if you know, where they are.

A. I have no knowledge whatever. I have no doubt that several of the lawyers who had access to them have forgotten to return them, but who I don't know.

114 X Q. I will ask you if any of those books that were removed

to your office were taken out with your consent by any gentlemen for examination.

A. I presume so, though I can't remember.

115 X Q. I will ask you if at the time you were attorney of the Atlantic & Pacific Railroad Company and performing the active duties as president and director of the defendant corporation the Seligmans were in anywise interested in the Atlantic & Pacific Railroad Company.

Objected to as irrelevant.

A. They were.

116 X Q. How interested?

A. They were stockholders and holders of the bonds of the company.

117 X Q. In about what amount were they stockholders of that corporation?

Objected to as irrelevant.

A. I have no memory as to the amount, but they were among the larger stockholders of the corporation.

118 X Q. State whether they sustained the same relation to the succeeding corporation, known as the St. Louis & San Francisco Railroad Company.

(Objected to.)

A. They did.

119 X Q. The road of those companies, I believe, runs from
76 St. Louis to Pierce City and thence on to Vinita, in the Indian Territory?

A. The main line runs from Franklin or Pacific City to Vinita, in the Indian Territory.

120 X Q. Passing through Pierce City, where the defendant corporation's line begins?

A. Yes, sir.

121 X Q. Do you know of any judicial proceedings ever having been instituted, either in the State of Missouri or the State of Kansas, having for its object the dissolution of the defendant corporation?

A. I know of none.

122 X Q. I will ask you if you ever entered the appearance of the defendant corporation in any suit in the St. Louis circuit court or in any other court in the State of Missouri after October, 1874, when, according to your statement, you turned over to the trustees in the mortgage all the property and franchises of the defendant corporation.

A. I don't remember of ever having done so.

123 X Q. I will ask you whether in case No. 55373, in the circuit court of St. Louis county, in which Chamberlin was the plaintiff and the railroad company was garnishee, if judgment was not rendered on a process served on you as president of the company December 20th, 1880.

Objected to as a matter of record.

A. I, on several occasions, have been served, as president of the company, with process, and I invariably told the officer that I did not regard myself as president of the company, and I don't think that I ever paid any attention to the cases one way or the other.

124 X Q. I will ask you, in case No. 31599, in the St. Louis circuit court, in which the Union Savings Association was plaintiff and the defendant corporation was the defendant, if process was not served on you December 11th, 1874, and if you did not
77 then, on behalf of the corporation, file an answer February 1st, 1875.

Objected to as a matter of record.

A. I have no recollection of having done so, and don't believe I did in person.

Witness makes an examination of the records of the court and says: By examining the original papers in the case I find that process was served on me as president of the company in December, 1874, and that T. J. Portis filed the answers in said case. I wish to say that Mr. Portis was a clerk and attorney in my office, and I don't think I ever gave him authority to enter my appearance or the appearance of the company in any suit whatever.

Re-examination by Col. Broadhead, counsel for the defendant:

Q. I will ask you if you ever appeared for the firm of J. & W. Seligman & Co., or any member of that firm, as attorney in any suits to which allusion has been made in the cross-examination.

A. I never have.

Q. I want to refresh your recollection about a matter Mr. Botsford has asked you, and I will ask this question: Do you recollect when you gave me authority to appear for you in this motion whether application was not made by John O'Day for me in Springfield? Didn't Mr. John O'Day apply to you in my behalf to authorize me and him to appear for you in this motion?

A. I think he did. I had forgotten how it was, but I think he did.

Q. And then you wrote to me or directed a letter to me and to him, didn't you, authorizing us to appear as attorneys for you in this matter?

A. Yes, sir.

By Mr. Botsford: What relation, if any, does John O'Day sustain to the St. Louis & San Francisco Railroad Company?

A. He is the general attorney of the company.

78 Q. Does he hold the same position in the Atlantic & Pacific?

A. No, sir.

By Col. Brodhead: Mr. John O'Day lives at Springfield, doesn't he?

A. Yes, sir.

Signature waived.

Exhibit A. Referred to in Jas. Baker's Deposition.

St. Louis, Mo., *Oct.* 1*st*, 1874.

At a special meeting of the directors of the Memphis, Carthage and Northwestern Railroad Co. held at the office of the Atlantic and Pacific Railroad Company, in St. Louis, Mo., the following directors and officers were present: James Baker, president; R. W. Wright, vice-president; A. A. Talmage, C. W. Rogers, and Ezra Miller, sec't'y.

The board met at 7 p. m., Mr. James Baker in the chair.

The following resolution was offered by Mr. C. W. Rogers, and, after being duly seconded by A. A. Talmage, was put to a vote, with the following result, the roll being called by the secretary: Mr. James Baker, Mr. R. W. Wright, Mr. A. A. Talmage, Mr. C. W. Rogers, & Mr. Ezra Miller voting in the affirmative, and they adopting the resolution by a unanimous vote.

* * * * * * *

Resolution.

Whereas this company has been and is still unable to pay any part of the interest due on its first-mortgage bonds now outstanding to the amount of $741,921.00, bearing seven per cent. interest in gold; and whereas the coupons on said bonds which matured on the 1st day of November, 1872, and on the 1st day of May, 1873, and on the first day of November, 1873, and on the first day
79 of May, 1874, *which* with the interest thereon, remain due
and unpaid; and whereas the coupons for the interest due on twenty of said bonds on the 1st (first) day of November, 1872, and on the 1st (first) day of May, 1873, was presented to this company for payment, and payment thereof demanded after the same became due and more than six months prior to this date, and default was made by this company in the payment thereof, which was continued for more than six months and does still continue;

And whereas the trustees in said mortgage have made application to this company to have all the mortgaged property and franchises and all the property, rights, franchises, and choses in action and every other thing conveyed by such mortgage or deed of trust to them turned over and the possession thereof delivered up to them as such trustees in the manner and for the purposes provided in said mortgage:

Therefore be it resolved by this board of directors, That the president of this company, James Baker, be, and he is hereby, authorized and directed to turn over, transfer, and assign all of said property, rights, and franchises to the said trustees mentioned in said mortgage *as* to their agent or attorney duly authorized by them to receive the same.

* * * * * * *

On motion of C. W. Rogers, Esq., the meeting then adjourned.

(Signed) JAMES BAKER, *Pres't.*
(Signed) EZRA MILLER, *Sec't'y.*

I certify that the foregoing is a true and perfect copy and transcript from the records of said corporation.

Witness my hand and the seal of said corporation this 4th day of January, A. D. 1875.

[SEAL.] EZRA MILLER, *Sec'y.*

JAMES BAKER, *President.*

80 And the deposition of H. H. Harding, which is in words and figures as follows, to wit:

Deposition of —— ——.

H. H. HARDING, of lawful age, being produced, sworn, and examined, deposeth and saith:

By Col. BROADHEAD:

1 Q. You reside in Carthage, Missouri?

A. Yes, sir; am attorney-at-law.

2 Q. Do you know anything about this corporation—the carthage & Northwestern Railroad Company?

A. Yes, sir; I was attorney for that company from about March or April, 1874, until about the first day of November, 1874, when the trustees under the mortgage formally took possession and then I ceased to be the attorney of that company, and was the attorney of the trustees afterwards.

3 Q. Do you know whether any one has been attorney for that company since that time?

A. It never has had an attorney since that time, to my knowledge.

4 Q. You were the last attorney, then, of that company?

A. Yes, sir.

5 Q. When was it turned over to the trustees?

A. It was finally turned over on the first day of November. Pay-rolls were made out in the name of the company for the month of October, and then, on the first day of November, all the blanks, pay-rolls, and everything (there was a circular issued, I think, dated that day showing the road had been turned over to the trustees, and after that the pay-rolls and the blanks we used—the old blanks that were used by the company)—and they were headed the Memphis, Carthage & Northwestern Railroad Company and with the other road printed right over that and names of the trustees in possession of it, and that changed the character of the blank in that respect, and the company then thereafter never transacted any business.
81 I was there connected with the operation of the road, but it never pretended to do any business after that.

6 Q. Did you know at the time you were attorney who the other officers of the road were?

A. Yes, sir; I knew.

7 Q. Do you know whether any of these officers have ever transacted any business in the name of the company since that time?

A. They never did, I think, at all.

8 Q. The road was sold in the early part of the winter of 1875, was it?

A. I think the road was sold out in January under the mortgage—1875, the 20th of January, if I am not mistaken.

Cross-examination by Mr. Botsford, counsel for plaintiff:

1 X Q. Was the sale under a power given in the deed, or a judicial foreclosure?

A. Sold under the power given in the deed.

2 X Q. There was no judicial foreclosure in any court, was there?

A. Not of the road in Missouri.

3 X Q. Was there of the road in Kansas?

A. There was a question raised afterwards whether the sale made under the power in the deed of trust —, although it was made to convey everything both in Kansas and Missouri, but a question was raised in 1875, perhaps, as to whether it was to convey the two interests, and there was a lot of judgment liens in Kansas, and it became a question whether there was a judicial sale over there afterwards, before the completion of the road.

4 X Q. Do you say on oath positively as a witness that this corporation has not in any instance been represented by counsel since you ceased to be its attorney?

A. I have not so stated. I did state that they had not had any regular general attorney.

5 X Q. That is all you state in that respect?

A. There was some litigation pending prior to that time in which probably the company was represented by an attorney.

6 X Q. Did you represent the corporation in those suits
82 after you ceased to be its general attorney?

A. I don't recollect any suits that I ever appeared in now. There may have been, but I don't recollect of any now.

7 X Q. When did you cease to be attorney?

A. On the first of November, 1874. If I did appear in any suit after that it was because I thought it might affect the interest of the trustees. I was their attorney and paid by them, but if I appeared in the name of the corporation after that I appeared because I thought the suits might affect their interests and of course felt at liberty to appear.

8 X Q. You represented the trustees in these bonds and mortgage, as also the company?

A. No, sir; I say I represented the company up to the first of November. After that I ceased to represent the company and became an employee of the trustees, who paid me my salary from the first day of November.

9 X Q. Did they pay you the same salary after that time that the company had paid you before?

A. No, sir; my recollection is my salary was increased a little afterwards. I don't know just the point of time it was done.

10 X Q. How long did they continue to pay you a salary after that?

A. They paid my salary up till the road was sold out under the mortgage, and when that was done the purchasers of the road who purchased at the mortgage sale operated it for a year or two and paid my salary.

11 X Q. And you think you may have appeared in the company's name and behalf in the interest of these other parties whom you afterwards represented as the general attorney?

A. What I said was that I may have appeared in some suits after that in the name of the company, but I have no recollection of having done so. If I did I said it was because I supposed the interests of the trustees might be affected.

12 X Q. But do I not understand you as swearing that the
83 company has not been represented by other counsel?

A. I have stated twice that I had not so sworn.

13 X Q. Can you swear positively, on your own knowledge, that none of the officers of the company have done any business of any kind for it since November, 1874?

A. Well, I simply swear to the best of my recollection. I think about that time of the winding up there was some—whatever was necessary. If it was necessary for them to act about the time of the transfer, if it appeared to be necessary for them to act in order to complete the assurance of turning over everything, — that perhaps something of the sort was done.

14 X Q. I don't think you get the precise scope of the question.

Question repeated.

A. I don't think they have, as far as I know.

15 X Q. That don't quite answer me yet. I wish to know if you can swear that positively.

A. I think I have answered. Whatever I have said I will stand by.

16 X Q. Do you know the officers and directors of this corporation have not done anything in its behalf in their official capacity since 1875?

A. Well, now, I will say this, that, according to my best recollection—I will not say positively, because I cannot pretend to say—I will say this: I think I should have known it if they had. I think my connection with the affairs of the company was such that I would have known it if they had, and I have no recollection of anything being done by the corporation.

17 X Q. Do you know of any judicial proceedings ever having been instituted in Missouri or Kansas having for their object the dissolution of this corporation?

A. No; I considered it dissolved by the selling out, but I don't think anything of the kind was ever done.

84 18 X Q. If such a suit had been instituted would you have
been apt to know it?

A. Yes, sir.

19 X Q. Mention has been made by the witness Baker of the loss of a book containing the stubs of certificates of stock issued by the

company; do you know anything about the existence or whereabouts of the said book?

A. I do not.

20 X Q. Have you had it in your possession within the last five years?

A. No.

20½ X Q. Have you seen it out of St. Louis?

A. No.

21 X Q. Have you ever had any intimation or information as to the whereabouts of said book?

A. No, sir.

22 X Q. Do you know anything about the whereabouts of the book of the defendant corporation containing a list of the stockholders of the corporation?

A. There was such a book—yes, sir. I knew there was such a book.

23 X Q. Where is it?

A. I don't know; probably down in Gov. Fletcher's office.

24 X Q. In the office Judge Baker occupied?

A. I think probably it is there; I don't know.

Signature waived.

And the deposition of Jas. O. Broadhead, which is in words and figures as follows, to wit.

Deposition of —— ——.

J. O. Broadhead, of lawful age, being produced, sworn, and examined, deposeth and saith:

I wish to state that it appears in this case of William C. Wilson *vs.* The Memphis, Carthage & Northwestern Railroad Company that a plea in abatement was filed and signed John O'Day, attorney for the defendant; that plea is in my handwriting, and I wish to explain how it got there. It occurred in this way: When this suit was instituted I obtained the knowledge of it from the news-
85 papers, and I am one of the attorneys for J. & W. Seligman & Co., against whom various proceedings have been had claiming they are stockholders of the Memphis, Carthage & Northwestern Railroad Company, and these suits have been instituted against them under the provisions of the statute after judgment is rendered in favor of creditors against the company. There had been no one authorized to appear for the corporation, and these suits had gone to judgment without their knowing anything about them in any instance. I requested John O'Day, who lives in Springfield, Missouri, where Judge Baker resides, and who also is attorney for the St. Louis & San Francisco Railroad Company, and is frequently here in St. Louis, to see Judge Baker and request him to get some one to act as his attorney, to raise the question as to whether he was president of the company or not. Mr. O'Day saw Judge Baker and he gave him and myself written authority, which was sent to me

through the mail—which I have somewhere about the office—to appear for him personally in this case. I thereupon filed the motion, which is the motion now under consideration, to quash the writ and service in the name of Judge Baker. Mr. O'Day had handed me the letter. I stated that it came by mail, but it was handed to me signed by Judge Baker, and I am under the impression that Mr. O'Day authorized me to put in the plea for him; also for the corporation. I put in the motion and signed his name and my name also to it as attorneys, as appears on the record of the motion to quash. I also put in this plea of abatement, which is in my handwriting, and signed Mr. O'Day's name to it as attorney for that company. I had not seen Mr. O'Day in regard to it, until very recently, from the time it was filed, and then I learned from him that I was mistaken in his giving me any such authority. He
was authorized, he said, to appear for Judge Baker, but not for
86 the company; so that what I have to say in regard to this
is that this plea was filed in the name of Mr. O'Day by mistake. Those are the facts in the case. The entry withdrawing it was made by me and on my application to the judge, when I found out the facts in the case. I went and withdrew it by consent of Mr. O'Day. He authorized me to do it in a note which I have here, in which he states he was "only authorized to appear for Judge Baker. Withdraw appearance entered for me in behalf of stockholders; you are mistaken; have no authority to appear for stockholders, only for Judge Baker."

Cross-examination declined.
Signature waived.

This is all the evidence offered by James Baker.

Plaintiff then offered and read in evidence a certified copy of the original articles of association of the Memphis, Carthage and Northwestern Railway Company of Missouri of July 24th, 1871, which is in words and figures as follows, to wit:

Certified Copy of the Original Articles of Association of the M., C. & N. W. R. R. Co.

Articles of association.

We, Leonidas P. Cunningham, Edwin H. Brown, Charles Marquis, Josiah P. Boyd, Henry C. Young, John S. Phelps, and John B. Perkins, have this day associated ourselves together for the purpose of constructing, maintaining, and operating a railroad for public use from the town of Pierce City, in Lawrence county, Missouri, to the town of Carthage, in Jasper county, Missouri, a distance of twenty-six miles, passing through a portion of the counties of Lawrence and Jasper, in said State of Missouri, to be known by the corporate name of the Memphis, Carthage and Northwestern Rail-
road Company; that the operation and maintaining of said
87 railroad shall be perpetual and forever; that the capital stock

of said company is seven hundred and fifty thousand dollars, and divided into shares of one hundred ($100) dollars each.

That the following-named persons are the directors of said company *are:* Leonidas P. Cunningham, Edwin H. Brown, Charles Marquis, Josiah P. Boyd, Henry C. Young, John S. Phelps, and John B. Perkins.

In witness whereof we have hereby made and signed these articles of association and subscribed our names, with our residence and the number of shares of stock we severally agree to take in said company set opposite to and following our names.

Names.	Residence.	No. of shares.	Am't.
Leonidas P. Cunningham	Carthage, Jasper Co., Mo.	Fifty	$5,000 00
Edwin H. Brown	Carthage, Jasper Co., Mo.	Fifty	5,000 00
Charles Marquis	Sarcoxie, Jasper Co., Mo.	Twenty-five	2,500 00
Josiah P. Boyd	Sarcoxie, " "	Twenty-five	2,500 00
Henry C. Young	Springfield, Mo.	Thirty-seven	3,700 00
John S. Phelps	" "	Thirty-seven	3,700 00
John B. Perkins	Pierce City, "	Thirty-six	3,600 00

Dated this 21st day of July, A. D. 1871.

STATE OF MISSOURI,
County of Lawrence, } *ss:*

We, Henry C. Young, John S. Phelps, John B. Perkins, Edwin H. Brown, and Leonidas P. Cunningham, five of the directors named
in the articles of association of the Memphis, Carthage and
88 Northwestern Railroad Company, do solemnly swear that
there has been in good faith subscribed to the capital stock of said company the sum of twenty-six thousand dollars, and that five per centum has been paid thereon in cash in good faith to the directors named in said articles of association, and that it is intended in good faith to construct, maintain, and operate the railroad mentioned in said articles of association.

HENRY C. YOUNG.
JOHN S. PHELPS.
JOHN B. PERKINS.
EDWIN H. BROWN.
LEONIDAS P. CUNNINGHAM.

The above sworn to and subscribed before me this 21st day of July, A. D. 1871.

[SEAL.]

LEWIS L. L. ALLEN,
Notary Public.

Filed July 24th, 1871.

EUGENE F. WEIGEL,
S'y of State.

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of the articles of association of the "Memphis, Carthage and Northwestern Railroad Company," filed July 24th, 1871, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri. Done at the city of Jefferson this sixth day of February, A. D. eighteen hundred and eighty-one.

[SEAL.] MICH'L K. McGRATH,
Secretary of State.

89 *Certified Copy of the Original Articles of Association of the State Line, Oswego and Southern Ka's R'y Co.*

Plaintiff then offered and read in evidence a certified copy of the original article of association of the State Line, Oswego and Southern Kansas Railway Company of Kansas of April 5th, 1872, which is in words and figures as follows, to wit:

We, whose names are hereunto subscribed, do hereby certify and proclaim that we have associated ourselves together as a corporation for the purpose of constructing and operating a railway within the State of Kansas, and it is further agreed that the name of said corporation shall be "The State Line, Oswego and Southern Kansas Railway Company;" that the purpose of forming such corporation is to construct, maintain, and operate a railway; that the place of transacting the business of such corporation shall be at the city of Oswego, in the county of La Bette, in the State of Kansas; that such corporation shall exist for the full term of ninety-nine years; that there shall be seven directors of such corporation; that the names and places of residence of the directors appointed for the first year are as follows: J. J. Higgins, Oswego, La Bette county, Kansas; J. A. Miller, Oswego, La Bette county, Kansas; David Kelso, Oswego, La Bette county, Kansas; W. J. Lea, Columbus, Cherokee county, Kansas; H. C. Purcell, Columbus, Cherokee county, Kansas; M. V. B. Bennett, Independence, Montgomeay county, Kansas; A. L. Austin, Oswego, La Bette county, Kansas.

The amount of the capital of said corporation is one million of dollars, and is divided into ten thousand shares of one hundred dollars each.

That the kind of a road intended to be constructed is a railway, made in the usual manner, suitable for the public use in the conveyance of persons and property.

That the said railway is intended to be run from a point on the State line of Kansas, in the county of Cherokee, in said
90 State, between the northeast corner of and the southeast corner of said Cherokee county, and running thence westerly through said county of *of* Cherokee by way of the city of Columbus, and through the county of La Bette by way of the city of Oswego, and thence

through the county of Montgomery by way of the city of Independence, and thence through the counties of Howard, Cowley, Sumner, Harper, Barbour, Comanche, and Clarke, all in the State of Kansas, to a point on the western line of the State of Kansas, in the county of Clarke, between the northwest corner of and the southwest corner of said Clarke county.

That we, whose names are hereunto signed and subscribed and who constitute the said corporation, do declare that we are all citizens of the State of Kansas.

In testimony whereof we have hereunto subscribed our names this 30th day of March, A. D. 1872.

W. J. LEA.
DAVID KELSO.
M. V. B. BENNETT.
H. C. PURCELL.
J. J. HIGGINS.
J. A. MILLER.
A. L. AUSTIN.

STATE OF KANSAS,
County of Cherokee, } *ss:*

Be it remembered that on this 30th day of March, A. D. 1872, personally appeared before me the undersigned, county clerk of the county of Cherokee, in the State of Kansas, W. J. Lea and H. Purcel, who are personally known to me, to be the identical persons who executed the foregoing instrument of writing, and duly acknowledged the same to me to be their voluntary act and deed for the uses and purposes therein mentioned; and I further certify that I am personally acquainted with each of said persons and know them to be citizens of the State of Kansas.

In witness whereof I have hereunto set my hand and affixed
91 the seal of my office on the day and year last above written.

[SEAL.] J. C. NORRIS,
County Clerk.

STATE OF KANSAS,
County of Montgomery, } *ss:*

Be it remembered that on this first day of April, A. D. 1872, personally appeared before me, the undersigned notary public of the county of Montgomery aforesaid, M. V. B. Bennett, who is personally known to me to be the identical person who executed the foregoing instrument of writing, and fully acknowledged the same to me to be his voluntary act and deed for the uses and purposes therein mentioned, and I further certify that I am personally acquainted with said person and know him to be a citizen of the State of Kansas.

In testimony whereof I have hereunto signed my name and affixed my official seal, at office, in the city of Independence, in said county *county* and State, the day and year last herein above written.

[SEAL.] C. M. RALSTIN,
Notary Public.

STATE OF KANSAS, } *ss:*
County of Labette, }

Be it remembered that on this 3rd day of April, A. D. 1872, before me, the undersigned, a notary public in and for said county of Labette, in the State of Kansas, personally appeared John J. Higgins, J. A. Miller, A. L. Austin, and David Kelso, who are personally known to me to be the same persons who executed the above and foregoing instrument of writing as parties thereto, and duly acknowledged to me that they executed the same to be their voluntary act and deed for the uses and purposes therein men-
92 tioned, and I further certify that I am personally acquainted with each of said persons and know them to be citizens of the State of Kansas.

In testimony whereof I have hereunto signed my name and affixed my official seal, at office, in the city of Oswego, in the county and State aforesaid, on the day and year above written.

[SEAL.] NELSON CASE,
Notary Public.

STATE OF KANSAS:

SECRETARY'S OFFICE.

I, James Smith, secretary of state of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing filed in my office April 5th, 1872.

In testimony whereof I have hereunto subscribed my name and affixed my official seal. Done at Topeka this 9th day of February, A. D. 1882.

[SEAL.] JAMES SMITH,
Secretary of State.

Plaintiff then offered and read in evidence a duly certified copy of the articles of consolidation of said Memphis, Carthage and Northwestern Railway Company and the said State Line, Oswego and Southern Kansas Railway Company, under the name of defendant corporation, April 13th, 1872, which is in words and figures following, to wit:

Certified Copy of the Articles of Consolidation of the M., C. & N. W. R. R. Co. with State Line, Oswego & S. K. R'y Co.

[U. S. revenue stamp, 5c.]

This agreement, made and entered into this 8th day of April, A. D. 1872, by and between the State Line, Oswego and Southern Kansas Railway Company, a corporation duly formed under the
93 laws of the State of Kansas, of the first part, and the Memphis, Carthage and Northwestern Railroad Company, a corporation duly formed under the laws of the State of Missouri, of the second part, witnesseth:

That whereas the parties hereto are the owners of railroads now constructed in part, which, when completed and connected, will form a continuous line of railroad: It is, therefore, hereby expressly agreed that the two railroad companies above named and the stock thereof shall be, and are hereby, consolidated and one company formed of

the said two companies; and it is further agreed that such consolidated company shall be known by the name of the Memphis, Carthage and *and* Northwestern Railroad Company, and that the object of such company is to construct and operate a continuous line of railroad from the town of Pierce City, in Lawrence county, Missouri, to Carthage, in Jasper county, Missouri; thence west through Cherokee county, Kansas, by way of Columbus and through Labette county by way of Oswego; thence west through the county of Montgomery by way of Independence; thence west through the counties of Howard, Cowley, Sumner, Harper, Barbour, Comanche, and Clarke to the western boundary of the State of Kansas, the estimated length of such railroad being five hundred miles; that there shall be nine directors in such consolidated company; that the directors of such consolidated company shall be M. V. B. Bennett, John J. Higgins, and David Kelso, of the State of Kansas; Clinton B. Fisk, Edwin H. Brown, George P. Cunningham, Charles Marquis, J. P. Boyd, and L. P. Cunningham, of the State of Missouri, all of whom shall constitute the board of directors until the next election, which is hereby fixed to take place on the first Tuesday of March in each year; that all the rules, by-laws, and regulations adopted by the said Memphis, Carthage and Northwestern Railroad Company before this date shall be and remain in
94 force as the by-laws, rules, and regulations of such consolidated company till changed or altered as in said by-laws is provided may be done; that the officers of the said Memphis, Carthage and Northwestern Railroad Company at this date shall be and remain as the officers of the consolidated company until the next general election, which is hereby fixed to take place on the day of the election of the directors, as hereinbefore mentioned; that the chief office of the consolidated company for the transaction of its business shall be at the city of Carthage, in the county of Jasper, in the State of Missouri; that all certificates of stock outstanding in either of said companies may be by the holders thereof surrendered for cancellation and receive in return certificates for a like amount of stock in the consolidated company; that by the vote or consent in writing given of the holders of at least two-thirds of the stock outstanding in the consolidated company the directors thereof may be reduced to any number not less than five or increased to any number not exceeding thirteen; that the capital stock of such consolidated company shall be ten millions of dollars ($10,000,000.00), and divided into one hundred thousand shares of one hundred dollars each.

In witness whereof the said companies have, by their respective presidents, subscribed this agreement on the day and year first herein above written.

[U. S. int. rev. 5c. stamp.]

THE STATE LINE, OSWEGO & SOUTHERN
KANSAS RAILWAY COMPANY,
By J. J. HIGGINS, *President.*
THE MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY,
By L. P. CUNNINGHAM, *President.*

95 We, the undersigned stockholders, who are the holders of and representing all of the stock of the St. Line, Oswego and Southern Kansas Railroad Company, do hereby in writing fully approve and ratify the above and foregoing contract of consolidation between the said company, of one part, and the Memphis, Carthage and Northwestern Railroad Company, of the other part, dated the — day of April, A. D. 1872.

In witness whereof we have hereunto set our hands this — day of April, A. D. 1872.

W. J. LEA.
H. C. PURSELL.
M. V. B. BENNETT.
J. J. HIGGINS.
DAVID KELSO.
A. L. AUSTIN.
J. A. MILLER.

STATE OF KANSAS,
County of Labette, } *ss:*

John J. Higgins and David Kelso, being duly sworn, depose and say as follows: That the said Higgins is the president of the State Line, Oswego and Southern Kansas Railway Company, a corporation duly formed under the laws of the State of Kansas, and he, said Kelso, is secretary of said company; that they have full knowledge of the facts hereinafter stated, and they do further say and state that W. J. Lea, H. C. Pursell, M. V. B. Bennett, J. J. Higgins, David Kelso, A. L. Austin, and J. A. Miller are the holders of and representing all of the stock of the said State Line, Oswego and Southern Kansas Railway Company.

DAVID KELSO.
J. J. HIGGINS.

Sworn to and subscribed before me this 3rd day of April, A. D. 1872.

[SEAL.]

NELSON CASE,
Notary Public.

96 We, the undersigned stockholders, who are the holders of and representing all of the stock of the Memphis, Carthage and Northwestern Railroad Company, do hereby in writing fully approve and ratify the above and foregoing contract of consolidation between the said company, of one part, and the State Line, Oswego and Southern Kansas Railway Company, of the other part, dated the 8th day of April, A. D. 1872.

In witness whereof we have hereunto set our hands this 8th day of April, A. D. 1872.

L. P. CUNNINGHAM.
CHARLES MARQUIS.
CLINTON B. FISK.
J. P. BOYD.
E. H. BROWN.
GEO. P. CUNNINGHAM.

STATE OF MISSOURI, }
County of Jasper, } *ss:*

L. P. Cunningham and E. H. Brown, being duly sworn, depose and say as follows: That the said Cunningham is the president of the Memphis, Carthage and Northwestern Railroad Company, a corporation duly formed under the laws of the State of Missouri, and he, said Brown, is secretary of said company; that they have full knowledge of all the facts herein stated, and they do further say and state that Clinton B. Fisk, Charles Marquis, J. P. Boyd, George P. Cunningham, E. H. Brown, and L. P. Cunningham are the holders of and representing all of the stock of the said Memphis, Carthage and Northwestern Railroad Company.

L. P. CUNNINGHAM.
E. H. BROWN.

Sworn to and subscribed before me this 8th day of April, A. D. 1872.

[SEAL.] B. F. GARRISON,
Notary Public.

97 Filed April 13, '72.

EUGENE F. WEIGEL,
Sec'y of State.

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of articles of consolidation of the State Line, Oswego and Southern Kansas Railway Company and the Memphis, Carthage and Northwestern Railroad Company, under the name of the Memphis, Carthage and Northwestern Railroad Company, filed April 13, 1872, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

Done at the city of Jefferson this sixth day of February, A. D. eighteen hundred and eighty-two.

[SEAL.] MICH'L K. McGRATH,
Secretary of State.

Plaintiff then offered in evidence and read in evidence the original records of the service of process on James Baker, as president of defendant corporation, and judgments rendered in the St. Louis circuit court in favor of various parties against defendant corporation, as follows, to wit:

(Clerk will here copy service of writ of summons, Dec. 11th, 1874, answer of defendant and record of filing same, Feb'y 1st, 1875, and final judgment against defendant, June 2nd, 1875, St. Louis circuit court, No. 31599, in case of Union Savings Association against Memphis, Carthage and Northwestern Railway Company.)

98 Clerk will also copy service of summons and record of final judgment as follows:

55373. Chamberlain *vs.* M., C. & N. R. W. Co. Judg't 25 March, 1881; service Dec. 20, '80.

55374. Sheppen *vs.* Same. Judg't Ap'l 16, '81; service Dec. 20, '80.

55375. Lee *vs.* Same. Judg't Ap'l 14, '81; service Dec. 20, '80.

55376. Lee *vs.* Same. Judg't March 25, '81; service Jan'y 3, '81.

56065. Higgins *vs.* Same. — June 9th, '81; service May 2, '81.

56066. Kelso *vs.* Same. — June 10, '81; service May 2d, '81.

56375. Peoples' Savings Ins. Co. *vs.* Same. Judg't June 30, '81; service June 2, '81.

56376. Daugherty *vs.* Same. Judgment Aug. 1st, 1881; service June 3, '81.

Plaintiff then offered in evidence, and read the same, a duly certified copy of the judgment in the court of common pleas of Jasper Co., Missouri, May —th, 1875, in the case of Joseph Shippen, plaintiff, *vs.* The Memphis, Carthage & Northwestern Railway Co., defendant, which is in words and figures as follows, to wit:

(Clerk will here copy said judg't record and the certificate thereto attached.)

Plaintiff then offered in evidence, and read the same, a duly certified copy of the record of the judgment in said common pleas court May —th, 1875, Daugherty *vs.* same defendant, which is in words and figures as follows, to wit:

(Clerk will here copy the record of said judgment and the certificate thereto attached.)

Plaintiff then offered and read in evidence a certified copy of the answer of J. & W. Seligman & Co. in the case of Burgess *vs.* Joseph Seligman *et al.* (No. 1336), U. S. circuit court, western district of Missouri, which is in words and figures as follows, to wit:

(Clerk will here copy the certified copy of said answer, with the certificate thereto attached.)

99 This was all the evidence offered.

Whereupon the court took the matter under advisement and on March 6th, 1882, overruled said motion; to which judgment of the court in overruling said motion James Baker, by his attorneys, at the time excepted, and now presents his bill of exceptions and prays that the same may be signed and sealed and made a part of the record; which is accordingly done.

AMOS M. THAYER, *Judge.* [SEAL.]

And afterwards, on the 20th day of November, 1882, the following stipulation is filed in said cause, to wit:

Stipulation.

In the Circuit Court of the City of St. Louis, Missouri.

William C. Wilson, Plaintiff,
against
The Memphis, Carthage & Northwestern Railroad Company, Defendant.
No. 56752.

It is agreed that the above cause may be tried by the court without a jury.

BOTSFORD & WILLIAMS,
For the Plaintiff.
JAS. O. BROADHEAD,
For the Defendant.

And afterwards, on the 18th day of December, 1882, by leave of court having been first had and obtained, the defendant, by attorney, files its amended answer to plaintiff's petition in words and figures as follows, to wit:

Amended Answer.

In the Circuit Court for the City of St. Louis.

100 William C. Wilson, Plaintiff,
vs.
The Memphis, Carthage & Northwestern R. R. Co., Defendant.

And now comes defendant and, by leave of court, for amended answer to the petition of plaintiff in the above-entitled cause, denies all and singular the allegations of the petition except as hereinafter admitted.

And for further answer to said petition the defendant says that it is true that in the month of October, 1871, one Edward Burgess did make a contract with this defendant to construct and complete the grading, masonry, paving, grubbing, & clearing, including the materials requisite for the same, upon the part of the railroad of defendant between Pierce City, in the county of Lawrence, and the depot in the town of Carthage, in the county of Jasper and State of Missouri, on the terms and conditions mentioned in said contract, and in payment for said work and materials the said Burgess was to receive from defendant the bonds of any towns, townships, and counties through which the railroad of defendant might pass, the defendant to do and perform all acts necessary to enable the said Burgess to obtain all the municipal bonds due him under said contract as soon as practicable, by compliance on its part with all the conditions under which said bonds were subscribed and pledged, which said obligations were fully complied with on the part of this defendant; that thereafter the township of Marion, one of the municipal town-

ships of the said county of Jasper, through which the railroad of defendant passes, at an election duly held in said township on the 5th day of March, 1872, voted a subscription of seventy-five thousand dollars to the capital stock of said railroad company, upon the terms and conditions contained in an order of the county
court of said county of Jasper, of the date of the 10th of
101 February, A. D. 1872, and that thereafter, to wit, on the 28th
of March, the county court of said county, in pursuance of said vote, made an order that subscription be made to the capital stock aforesaid, and that the bonds of the said county for and on behalf of said township to that amount be issued in payment of said subscription and in accordance with the terms thereof; that thereupon the said railroad company issued and delivered to the proper authorities of said county, for the use of said township, certificates of stock in said corporation to the amount of said subscription; and in part payment to the said Burgess for work and labor done and materials furnished under said construction contract this defendant, The Memphis, Carthage and Northwestern Railroad Company, gave the said Burgess an order on the said county of Jasper for the delivery to him of bonds to be issued by the said county to the use of said township to the amount of fifty thousand dollars at a valuation agreed upon by and between the said Burgess and this defendant, and the said Burgess agreed to receive and did receive said order in part payment, as aforesaid, of work and labor done and materials furnished under the terms of said construction contract; that at the time of giving said order by this defendant and the acceptance of the same by the said Burgess, in part payment and satisfaction of work done by him and materials furnished under said construction contract, the bonds aforesaid authorized by the vote of Marion township and the order of the said county court made in pursuance thereof had not been issued, but upon the application of the said Burgess and in pursuance of said order of this defendant in that behalf the said bonds to the amount of fifty thousand dollars were duly issued by said county of Jasper to the use of said Marion township and delivered to the said Burgess, which said bonds
were evidences of debt of the said county and township,
102 and in consideration for which this defendant issued its stock
to the said county to the use of said township for a similar amount. At what time said bonds were issued and of the date thereof this defendant is not informed, but defendant says that after the receipt of said bonds by the said Burgess he, the said Burgess, pledged the same as collateral security for the payment of a debt due by him to the Union Savings Association of the City of St. Louis, a banking corporation created under the laws of Missouri and doing business in the city of St. Louis, which said bonds were taken and received by the said banking institution as collateral security for said debt of the said Burgess; that whilst said bonds were so held as collateral security by the said Union Savings Association the plaintiff in this case was the vice-president of said institution; that, upon examination, it was ascertained that said bonds were not registered, as required by laws then in force and in force

at the time of the issue of said bonds, although this defendant had paid the consideration for which valid and legal bonds of said county for the use of said township were to be issued, and had transferred and assigned to the said Burgess all its right and claim against the said county for the issue of such bonds; that thereupon and for the purpose of evading the laws of Missouri requiring such bonds to be registered and certified the plaintiff in this case, being then one of the officers of the Union Savings Association, procured one R. S. Merwin, who was not then, but had been, presiding justice of the county court of Jasper county, to execute and sign fifty new bonds of the denomination of $1,000 each in lieu of the bonds originally issued as aforesaid and delivered as aforesaid to the said Burgess, falsely dated as of the 28th of March, 1872, when in truth and in fact these new bonds were made and executed and signed by said R. S. Merwin at the suggestion and instigation of the plaintiff in this suit in October or November, A. D. 1872,
103 and this defendant says that these new bonds, so fraudulently and illegally issued, were the same bonds which plaintiff in his petition claims to have purchased from the said Burgess, and that, whether plaintiff bought them from said Burgess or from the said Union Savings Association or however he may have acquired said bonds, he had full knowledge of their fraudulent execution and illegal character and connived at and advised their execution. This defendant says that it never had possession of said fraudulent bonds nor did it ever deliver the same to said Burgess in settlement or payment of any claim of the said Burgess against it.

Defendant further says that under the terms and conditions upon which said bonds were voted to be issued by the said county court of Jasper county to the use of said Marion township it was provided, among other things, that they were not to be delivered until the railroad of defendant should be completed to a connection with the Missouri River, Ft. Scott and Gulf railroad, at or near Columbus, Kansas, which terms and conditions were well known to said Burgess; that said Burgess made a second contract with this defendant by which he agreed to grade and do the masonry work on defendant's said railroad through, to, and beyond the said junction with the Missouri River, Ft. Scott & Gulf railroad at or near Columbus, Kansas, but said Burgess failed to complete his said contract and did not finish or complete said grade and masonry work to said junction, and hence and for that reason only defendant failed to comply with that condition of the vote of said bonds and have rendered them illegal and void.

Defendant denies all allegations of the plaintiff's petition, except as hereinabove admitted, and asks to be hence discharged with its costs.

And the said defendant, for a further defence herein, avers that plaintiff's cause of action, if any he has, accrued over five
104 years prior to the institution of this suit, and defendant says the same is barred by the statute of limitations of this State,

and it now pleads the same as a more complete bar to plaintiff's action and prays judgment.

H. H. HARDING AND
BROADHEAD AND HAEUSSLER,
Att'ys for Def't.

And afterwards, on the 5th day of January, 1883, the plaintiff, by attorney, files his reply to defendant's amended answer in words and figures as follows, to wit:

Reply.

In the Circuit Court for the City of St. Louis.

WILLIAM C. WILSON, Plaintiff,
vs.
MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

Reply to amended answer.

Plaintiff, for reply to defendant's amended answer, denies each and every allegation of new matter therein contained.

And for reply to the defense of the statute of limitations plaintiff says that his cause of action accrued under an instrument of writing, to wit, the contract dated in October, 1871, stated in his petition herein, and the sett lement of June 14th, 1872, also in writing, and that this cause of action accrued within ten years from the time of the commencement of this suit.

BOTSFORD & WILLIAMS,
For Plaintiff.

And afterwards, at a special term of the circuit court, being the April term, 1883, thereof, the following further proceeding was had in said cause, to wit:

105 *Judgment.*

WILLIAM C. WILSON
vs.
MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY. } 56752.

MONDAY, *April 2nd,* 1883.

Now, at this day, come said parties, by their respective attorneys, and, this cause coming on for hearing, said parties waiving a jury, submit this cause to the court upon the evidence and proofs adduced, and the court, having heard the same and being fully advised concerning the premises, doth find the issues herein joined in favor of the plaintiff, and doth assess his damages at the sum of seventy-two thousand seven hundred and ninety-nine dollars and thirty-eight cents. It is therefore considered by the court that said plaintiff recover of said defendant the damages aforesaid assessed as aforesaid, and also his costs and charges herein expended, and have execution therefor. Instructions filed.

Upon the rendition of said judgment executions were issued April 2nd, 1883, directed to the sheriffs of Jasper, Lawrence, and Newton counties and to the sheriff of the city of St. Louis; which executions, together with the sheriff's return thereon, are respectively in words and figures as follows, to wit:

Execution to Sheriff of Jasper Co.

THE STATE OF MISSOURI, } sct:
City of St. Louis, }

To the sheriff of Jasper county, Missouri, Greeting:

Whereas William C. Wilson, on the second day of April, in the year of our Lord one thousand eight hundred and eighty-three, at our circuit court, city of St. Louis, in the State of Missouri, recovered a judgment against Memphis, Carthage and Northwestern Railroad Company for the sum of seventy-two thousand seven hundred and ninety-nine dollars and thirty-eight cents for damages, with
106 interest at the rate of six per cent. per annum, together with his costs and charges in that suit expended:

These are therefore to command you that of the goods and chattels and real estate of the said Memphis, Carthage and Northwestern Railroad Company you cause to be made the damages, interest, and costs, and that you have the same before the judges of said court on the first Monday of June next, to satisfy the damages, interest, and costs aforesaid, and that you certify how you have executed this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereunto affixed, at office, in the city of St. Louis, this 7th day of April, in the year of our Lord eighteen hundred and eighty-three.

[SEAL.] CHAS. F. VOGEL,
Clerk Circuit Court.

Sheriff's Return.

Rec'd by me this 14th day of April, 1883.

R. M. ROBERTS,
Sheriff Jasper County, Missouri.

Executed the within writ in Jasper county, Missouri, on the 2nd day of June, 1883, by making diligent search and finding no property on which to levy.

R. M. ROBERTS,
Sheriff Jasper County, Missouri.

Execution to Sheriff of Lawrence Co.

THE STATE OF MISSOURI, } sct:
City of St Louis, }

To the sheriff of Lawrence county, Missouri, Greeting:

Whereas William C. Wilson, on the second day of April, in the year of our Lord one thousand eight hundred and eighty-three, at our circuit court, city of St. Louis, in the State of Missouri, recovered a judgment against Memphis, Carthage and Northwestern Railroad Company for the sum of seventy-two thousand seven hundred and ninety-nine dollars and thirty-eight cents for damages, with interest at the rate of six per cent. per annum, together with his costs and charges in that suit expended: 107

These are therefore to command you that of the goods and chattels and real estate of the said Memphis, Carthage and Northwestern Railroad Company you cause to be made the damages, interests, and costs, and that you have the same before the judges of said court on the first Monday of June next, to satisfy the damages, interest, and costs aforesaid, and that you certify how you have executed this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereunto affixed, at office, in the city of St. Louis, this 7th day of April, in the year of our Lord eighteen hundred and eighty-three.

[SEAL.] CHAS. F. VOGEL,
Clerk Circuit Court.

Sheriff's Return.

STATE OF MISSOURI, *County of St. Lawrence:*

MAY 25TH, 1885.

I hereby certify and return that the within railroad company have no property subject to execution in my county. I hereby return this execution—no property found.

W. S. RYAN,
Sh'ff Lawrence County, Mo.

Fee, 50c.

Execution to Sheriff of Newton Co.

THE STATE OF MISSOURI, } sct:
City of St. Louis, }

To the sheriff of Newton county, Missouri, Greeting:

Whereas William C. Wilson, on the second day of April, in the year of our Lord one thousand eight hundred and eighty-three, at our circuit court, city of St. Louis, in the State of Missouri, recovered a judgment against Memphis, Carthage and Northwestern Railroad Company for the sum of seventy-two thousand seven 108 hundred and ninety-nine dollars and thirty-eight cents damages, with interest at the rate of six per cent. per annum, together with his costs and charges in that suit expended:

These are therefore to command you that of the goods and chattels and real estate of the said Memphis, Carthage and Northwestern Railroad Company you cause to be made the damages, interest, and costs, and that you have the same before the judges of said court on the first Monday of June next to satisfy the damages, interest, and costs aforesaid, and that you certify how you have executed this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereunto affixed, at office, in the city of St. Louis, this 7th day of April, in the year of our Lord eighteen hundred and eighty-three.

[SEAL.]

CHAS. F. VOGEL,
Clerk Circuit Court.

Sheriff's Return.

Rec'd the within execution April 14, 1883.

L. B. HUTCHISON,
Sheriff of Newton Co., Mo. (*S.*)

No goods or chattels or real estate of the within-named defendant found in my county from which to levy the within-mentioned judgment and costs. "*Nulla bona.*"

June 4th, 1883.

L. B. HUTCHISON,
Sheriff of Newton Co., Mo. (*S.*)

Execution to Sheriff of City of St. Louis.

THE STATE OF MISSOURI, *City of St. Louis,* } *sct:*

To the sheriff of the city of St. Louis, Greeting:

Whereas William C. Wilson, on the second day of April, in the year of our Lord one thousand eight hundred and eighty-three, at our circuit court, city of St. Louis, in the State of Missouri, 109 recovered a judgment against Memphis, Carthage and Northwestern Railroad Company for the sum of seventy-two thousand seven hundred and ninety-nine dollars and thirty-eight cents damages, with interest at the rate of six per cent. per annum, together with his costs and charges in that suit expended:

These are therefore to command you that of the goods and chattels and real estate of the said Memphis, Carthage and Northwestern Railroad Company you cause to be made the damages, interest, and costs, and that you have the same before the judges of said court on the first Monday of June next, to satisfy the damages, interest, and costs aforesaid, and that you certify how you have executed this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereunto affixed, at office, in the city of St. Louis, this 7th day of April, in the year of our Lord eighteen hundred and eighty-three.

[SEAL.] CHAS. F. VOGEL,
Clerk Circuit Court.

Sheriff's Return.

No goods, chattels, or real estate found in the city of St. Louis belonging to the defendant whereon to levy this writ and make the debt and costs or any part thereof.

St. Louis, June 4th, 1883.

ISAAC M. MASON, *Sheriff,*
By J. F. MIELERT, *Deputy.*

Fee, 50c.

And be it further remembered that on the 9th day of July, 1883, there was filed in the office of the clerk of the circuit court, city of St. Louis, a motion for execution in a certain cause wherein William C. Wilson is plaintiff and Jesse Seligman *et al.*, stockholders Memphis, Carthage and Northwestern Railroad Company, are defendants;
110 which motion for execution, affidavit thereto, notice and proof of service, affidavits of Botsford and Wilson, are, respectively, in words and figures following, to wit:

Motion for Execution.

In the Circuit Court of the City of St. Louis, Missouri.

WILLIAM C. WILSON, Plaintiff,
against
MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY, Defendant.
56752.

And now comes said plaintiff and shows to the court that on the second day of April, A. D. 1883, he recovered a judgment, duly given and rendered by this court in this cause, against said defendant for the sum of seventy-two thousand seven hundred and ninety-nine and $\frac{38}{100}$ dollars as his debt ($72,799.38) and for the sum of one hundred and twenty-three and $\frac{45}{100}$ dollars as and for his costs ($123.45).

That thereupon executions on and for said judgment and costs were duly issued in this cause out of the clerk's office of this court, dated, respectively, April ninth, A. D. 1883, in favor of plaintiff and against defendant, to the counties of Lawrence, Jasper, and Newton, in this State, in which counties defendant was organized to build and in which alone it built its railroad.

That said three executions were severally made returnable to the June term, A. D. 1883, of this court, and that said executions, on the issue thereof, having been delivered to the sheriffs of said counties of Lawrence, Jasper, and Newton, said sheriffs have returned said three executions to said June term of this court; that there cannot be found in either of said counties of Lawrence, Jasper, and Newton any property or effects of said defendant whereon to levy said executions or any of them.

That upon the rendition of said judgment another execution was duly issued out of this court in this cause in favor of plaintiff
111 and against defendant for the recovery of said judgment,
debt, and costs, directed to the sheriff of the city of St. Louis, in which city defendant has its chief office; which last execution was dated the same as said three executions and was also returnable to said June term of this court, and which has been returned to said June term by the sheriff of said city of St. Louis, that there cannot be found in said city any property or effects belonging to said defendant whereon to levy said last-described execution.

That said defendant is insolvent and has no property of any kind, except the unpaid stock hereinafter described, and that defendant is a railroad corporation created under the general laws of this State.

That said judgment for said debt and costs is wholly due and unpaid and is still in full force, unreversed, and unsatisfied.

That the firm of J. & W. Seligman & Co. own and hold stock in defendant corporation for and in the sum of six million dollars, and that there is still due defendant from said J. & W. Seligman & Co. the unpaid balance of five million dollars on said stock, which balance has never been paid in whole or in part, and remains due as the property and assets of said defendant.

That said firm of J. & W. Seligman & Co. became the owners and holders of said stock in the year 1872, and have owned and held the same continuously ever since.

That the said firm of J. & W. Seligman & Co. was and is composed of Jesse Seligman and James Seligman, and that Joseph Seligman was also a member of said firm of J. & W. Seligman & Co., and with said Jesse Seligman and James Seligman composed all the members of said firm from the year 1872 to the year 1880, in which last year said Joseph Seligman departed this life.

That said Jesse Seligman and James Seligman have prop-
112 erty in this State subject to sale under execution more than
sufficient to pay plaintiff's said judgment in this cause.

That Charles W. Rodgers has been duly appointed the administrator of the estate of said Joseph Seligman by the probate court of the city of St. Louis, and that as such administrator said Rodgers is in charge of the estate of said Joseph Seligman.

The premises considered, plaintiff moves the court to order the issue of executions against said Jesse Seligman and James Seligman, and also against said Charles W. Rodgers as such administrator, for the amount of said judgment and costs.

BOTSFORD & WILLIAMS,
For the Plaintiff.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

The said William C. Wilson, being duly sworn, states that the matters set forth and contained in the foregoing motion are true.

WILLIAM C. WILSON.

Sworn to and subscribed before me this 21st day of June, A. D. 1883. My commission expires April 8th, 1884.

[SEAL.] JOHN H. VETTE,
Notary Public.

Notice and Proof of Service.

To Jesse Seligman, James Seligman, and Charles W. Rodgers, administrator of the estate of Joseph Seligman, deceased:

You and each of you are hereby notified that on the first day of the October term, A. D. 1883, of the circuit court for the city of St. Louis, Missouri, said first day of said term being the first day of October, A. D. 1883, and at the court-house in said city of St. Louis,
used and occupied by said circuit court, we will present the
113 following motion for the issue of execution against you to said
circuit court, in division No. five (5) thereof, before Hon. A.
M. Thayer, judge presiding, and ask that said motion be granted.

BOTSFORD & WILLIAMS,
Attorneys for the Plaintiff, William C. Wilson.

STATE OF NEW YORK, }
City of New York, } *ss:*

De Witt D. Cook, being duly sworn, states that on the second day of July, A. D. 1883, he delivered a true and full copy of the within motion and notice to each of the within, Jesse Seligman and James Seligman, in person, in said city and State of New York, and that affiant is over twenty-one years of age and a resident of the city of Brooklyn, N. Y.

DE WITT C. COOK.

Sworn to and subscribed before me this 3rd day of July, A. D. 1883. My commission expires March 30, 1885.

[SEAL.] PHILIP W. KOPPER,
Notary Public, N. Y. County.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Patrick Keenan, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Philip W. Kopper, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and
114 affixed the seal of the said court and county the 3 day of July,
1883.

[SEAL.] PATRICK KEENAN, *Clerk.*

Affidavit of J. S. Botsford as to Service.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

James S. Botsford, being duly sworn, states that he is one of the plaintiff's attorneys in this case, and that on July 9th, A. D. 1883, at said city of St. Louis, he, affiant, delivered personally to James O. Broadhead, the attorney of said Jesse Seligman and James Seligman, a true and full copy of said foregoing motion and notice, and that at the same time and in said city he, affiant, posted and put up a true and full copy of said motion and notice in the office of the clerk of the circuit court for said city.

JAMES. S. BOTSFORD.

Sworn to and subscribed before me this July 9th, A. D. 1883.

CHAS. F. VOGEL, *Clerk.*

Affidavit of Wm. C. Wilson as to Service.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

In the Circuit Court for said City.

WILLIAM C. WILSON, Plaintiff, }
against } No. 56752.
MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD }
COMPANY, Defendant. }

The above-named William C. Wilson, being duly sworn, states
that on the 13th day of July, A. D. 1883, at the said city of St.
Louis, he delivered to Charles W. Rodgers, administrator of
115 the estate of Joseph Seligman, deceased, a true and full copy
of the motion and notice thereof filed in said court on July
9th, A. D. 1883, in the above cause for an order of said court for the
issue of executions on the judgment in the above cause against said
Rodgers, as such administrator, and against Jesse Seligman and
James Seligman.

WILLIAM C. WILSON.

Sworn and subscribed before me this 13th day of July, A. D. 1883.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

And afterwards, at a special term of said circuit court, being the December term, 1883, thereof, the following further proceeding was had in said cause, to wit:

Judgment.

WILLIAM C. WILSON
vs.
MEMPHIS, CARTHAGE AND NORTHWESTERN RAILROAD COMPANY. } 61875.

On motion for execution against Jesse and James Seligman.

MONDAY, *December 3d*, 1883.

Now at this day comes the plaintiff, by his attorney, but the said Jesse and James Seligman, although called, fail to appear, and the plaintiff's motion for an execution against said Jesse Seligman and James Seligman coming on to be heard is submitted to the court on the proofs adduced in support of said motion and the agreement of counsel for plaintiff and of Messrs. Broadhead and Haeussler as friends of the court, and the court, having fully heard and considered the same, doth find that the plaintiff, on the 2nd day of April, 1883, recovered a judgment against the Memphis, Carthage and Northwestern Railroad Company in this court for the sum of $72,799.38 damages and costs; that thereafter,
116 to wit, on the 7th day of April, 1883, plaintiff caused executions to issue against said railroad company, but that no property, goods, or chattels of said defendant could be found or can be found whereon to levy said executions, and the same were returned accordingly *nulla bona;* and the court does further find that at the date of the rendition of the judgment and the issue and return of said execution Jesse Seligman and James Seligman, defendants in this motion, were stockholders of said Memphis, Carthage and Northwestern Railroad Company, owning and holding as such 60,000 shares of the stock of said company, of the par value of $100.00 each; that there remains unpaid upon said 60,000 shares of stock the sum of $5,000,000.00, and that there remains due and unpaid upon said judgment of plaintiff the sum of $75,838.00, and that said Jesse Seligman and James Seligman are liable to the execution of plaintiff in the said sum of $75,838.00. It is ordered by the court that said motion be sustained and that execution issue in favor of said plaintiff against said Jesse Seligman and James Seligman for the sum of seventy-five thousand eight hundred and thirty-eight dollars and the costs of these proceedings under the motion of plaintiff, and, the court having read the plaintiff's affidavit this day filed, it is further ordered that said execution issue forthwith.

Upon the rendition of said judgment execution was issued—same day directed to the sheriff of the city of St. Louis; which execution, together with the sheriff's return and all papers accompanying the same, are, respectively, in the words and figures as follows, to wit:

Execution.

The State of Missouri, } *sct*:
City of St. Louis, }

To the sheriff of the city of St. Louis, Greeting:

Whereas William C. Wilson, on the second day of April, in
117 the year of our Lord one thousand eight hundred and eighty-
three, at our circuit court, city of St. Louis, in the State of Missouri, recovered a judgment against Memphis, Carthage and Northwestern Railroad Company for the sum of seventy-two thousand seven hundred and ninety-nine dollars and thirty-eight cents damages, with interest at the rate of six per cent. per annum, together with his costs and charges in that suit expended; and whereas on the 3rd day of December, 1883, on motion of said William C. Wilson, plaintiff herein, said court awarded an execution in favor of said plaintiff and against Jesse Seligman and James Seligman, stockholders in said railroad company, for the sum of seventy-five thousand eight hundred and thirty-eight dollars' damages, with interest at the rate of six per cent. per annum:

These are, therefore, to command you that of the goods and chattels and real estate of the said Jesse Seligman and James Seligman you cause to be made the sum awarded against Jesse Seligman and James Seligman, to wit, the sum of $75,838.00 damages, interest, and costs, and that you have the same before the judges of said court on the first Monday of February next to satisfy the said last-mentioned sum, interest and costs aforesaid, and that you certify how you have executed this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereunto affixed, at office, in the city of St. Louis, this 3rd day of December, in the year of our Lord eighteen hundred and eighty-three.

[SEAL.] CHAS. F. VOGEL,
Clerk Circuit Court.

Sheriff's Return.

Executed this writ in the city of St. Louis this 3rd day of December, 1883, at 12.15 o'clock p. m., by levying upon and seizing all right, title, interest, & property of defendants, Jesse Seligman & James
Seligman, of, in, and to 2,820 shares (common) and 11,730
118 shares (preferred) stock in the St. Louis and San Francisco
railway, held in the name of Seligman Brothers; 120 shares (first preferred), 2,170 shares (preferred), and 5,150 shares (common) stock in the St. Louis and San Francisco railway, held in the name of J. & W. Seligman & Co., by delivering a copy of this writ, with a notice of the levy, addressed to said St. Louis & San Francisco railway, endorsed thereon, to Alexander Graydon, cashier of said company, who was in charge of said company's office & stock books, had charge thereof at time of service. The president or other

higher officer of said company cannot be found in the city of St. Louis.

ISAAC M. MASON, *Sheriff*,
By JOHN A. MIELERT, *D'y.*

And afterwards, on the 4th day of December, 1883, in said city of St. Louis, by virtue and authority of said levy, I advertised said personal property for sale as levied on by hand-bills, and afterwards, on the 18th day of December, in said city of St. Louis, by virtue of said levy and advertisement by hand-bills, I sold said personal property to the highest bidder, for cash, at the east front door of the court-house, as follows, to wit, to William C. Wilson, upon the terms and in No. of shares as follows, to wit:

119 1st. 100 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

2nd. The next 150 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

3rd. The next 200 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

4th. The next 300 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

5th. The next 400 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

6th. The next 500 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

7th. The next 500 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

8th. The next 500 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

9th. The next 500 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

10th. The next 500 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

11th. The next 500 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

12th. The next 500 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

13th. The next 500 shares common stock of the St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

1st. 100 shares preferred stock St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

2nd. The next 170 shares preferred stock St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

3d. The next 200 shares preferred stock St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

4th. The next 200 shares preferred stock St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

5th. The next 500 shares preferred stock St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

6th. The next 500 shares preferred stock St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

7th. The next 500 shares preferred stock St. L. & S. F. R. Co. in the name of J. & W. Seligman & Co., @ 25 c. per share.

120 shares 1st-preferred stock of the St. Louis & S. F. R. Co. in the name of J. & W. Seligman & Co. @ 50 c. per share.

1st. 100 shares common stock St. L. & S. F. R. Co. in the name of Seligman Bros., @ 25 c. per share.

2nd. The next 120 shares common stock St. L. & S. F. R. Co. in the name of Seligman Bros., @ 25 c. per share.

3rd. The next 200 shares common stock St. L. & S. F. R. Co. in the name of Seligman Bros., @ 25 c. per share.

4th. The next 400 shares common stock St. L. & S. F. R. Co. in the name of Seligman Bros., @ 25 c. per share.

5th. The next 500 shares common stock St. L. & S. F. R. Co. in the name of Seligman Bros., @ 25 c. per share.

6th. The next 500 shares common stock St. L. & S. F. R. Co. in the name of Seligman Bros., @ 25 c. per share.

7th. The next 500 shares common stock St. L. & S. F. R. Co. in the name of Seligman Bros., @ 25 c. per share.

8th. The next 500 shares common stock St. L. & S. F. R. Co. in the name of Seligman Bros., @ 25 c. per share.

1st. 100 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

2nd. The next 130 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., at 25 c. per share.

3rd. The next 200 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

120 4th. The next 300 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

5th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

6th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

7th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

8th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

9th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

10th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

11th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

12th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

13th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

14th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

15th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

16th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

17th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

18th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

19th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

20th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

21st. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

22nd. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

23rd. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

24th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

25th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

26th. The next 500 shares preferred stock in the name of Seligman Bros. of the St. L. & S. F. R. Co., @ 25 c. per share.

Said sale amounting, in the aggregate, to the price and sum of $5,527.50, which said amount ($5,527.50), after satisfying all costs on this execution, leaves a credit on same of $5,391.30.

ISAAC M. MASON, *Sheriff*,
By WM. H. MASON, *Deputy*.

Costs:

Court costs	$9 65
Advertising	9 00
Levy and com.	117 55
	$136 20

121 Served the notice of the above sale on Alexander Graydon, cashier of said St. Louis and San Francisco Railway Company, this 19th day of December, 1883.

ISAAC M. MASON, *Sheriff*.

No other goods, lands, chattels, or tenements found in the city of St. Louis belonging to the defendants whereon to levy & make the balance of debt or any part thereof.

ISAAC M. MASON, *Sheriff*,
By WM. H. MASON, *Deputy*.

122 No. —.

Itemized list of clerk's fees.			Itemized list of sheriff's fees.				Witness fees.					Total costs.		
	Dolls.	Cts.	No.		Dolls.	Cts.	Names.	Days.	Miles.	Dolls.	Cts.		Dolls.	Cts.
Amended petition......				Sheriff Harrington:								Clerk Vogel		
Agreed statement......				Serving summons.....								Sheriff Harrington		
Appearances		40		Serving rules of court, notices, &c...								" Mason		
Answers....................		20										" ——		
Affidavits	1	50		Serving subpœnas and calling witnesses..................								" ——		
Abstracting................												Attorney................		
Acknowledgment												Plaintiff		
Bond and approval.....				Serving attachments.								Defendant		
Bill of exceptions.				Summoning and calling jury								Witnesses		
Continuances		50										Jury.......................		
Copies..................				Calling action and parties		15						Costs on transcript.......		
Dedimus														
Demurrer..................												Notary....................		
Depositions................												"		
Docketing...................		40										"		
Entering and filing.....		40										Referee		
Exhibits				Sheriff Mason:								Garnishee		
Ex-awarded		30		Serving summons.....										
Execution..................	1	00		Serving rules of court, notices, &c...										
Fee bill.......................														
Filing...............		05		Serving subpœnas and calling witnesses..................										
Instructions														
Jury waived...............														
Jury called—sworn and certificate.........				Serving attachments										
Judgment, dio final....	1	00		Summoning and calling jury										
" special on record....................				Calling action and parties										
Motions.....................		60												
Orders.................. ...		90												
Oaths.....														
Replies........................				Sheriff ——:										
Report, sheriff's.........				Serving summons.....										
" commissioner's...........				Serving rules of court, notices, &c...										
" referee's........														
Subpœnas, attachments......................				Serving subpœnas and calling witnesses..................										
Submissions...............														
Stipulations..............				Serving attachments.										
Taxing costs and certificate.....................		75		Summoning and calling jury										
Venire........................				Calling action and parties										
Verdict entered.........														
Writs........														
Mandate and opinions														
	9	50												

123 STATE OF MISSOURI, } ss:
City of St Louis, }

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, certify the foregoing to be a true statement of each and every item of all taxable costs in the case of Wm. C. Wilson *vs.* Jesse Seligman *et al.*

Witness my hand and the seal of said court, at office, in the city of St. Louis, this 3d day of December, in the year of our Lord eighteen hundred and eighty-three.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

[Endorsed :] Bill of costs. Case No. —. —— ——, pl'ff, *vs.* —— ——, d'f't.

124 *Sheriff's Sale.*

Handbill of sale.

By virtue and authority of an execution issued from the office of the clerk of the circuit court of the city of St. Louis, returnable to the February term, 1884, of said court and to me directed, in favor of William C. Wilson and against Jesse Seligman and James Seligman, as stockholders of the Memphis, Carthage and Northwestern railroad, I have levied upon and seized all the right, title, and interest of the defendants of, in, and to the following-described personal property, to wit:

2,820 shares common and 11,730 shares preferred stock of the St. Louis and San Francisco railway, held in the name of Seligman Brothers; also 120 shares first preferred, 2,170 shares preferred, and 5,150 shares common stock of the St. Louis and San Francisco railway, held in the name of J. & W. Seligman & Co.; and I will, on Tuesday, the 18th day of December, 1883, between the hours of nine o'clock in — forenoon and five o'clock in the afternoon of that day, at the east front door of the court-house, in the city of St. Louis, State of Missouri, sell, at public auction, for cash, to the highest bidder, all the right, title, interest, and claim of the above-named James Seligman and Jesse Seligman of, in, and to the above-described personal property to satisfy said execution and costs.

Sale commences at 12 m., sharp.

St. Louis, Mo., December 4th, 1883.

ISAAC M. MASON,
Sheriff of the City of St. Louis.

Letter from Alex. ***Graydon*** *to I. M. Mason, Sheriff.*

"Frisco Line," Saint Louis & San Francisco Railway Company,
law department. John O'Day, general attorney.

ST. LOUIS, *December 5th*, 1883.

Isaac M. Mason, Esq., sheriff St. Louis city, Mo.:

125 DEAR SIR: On December 3rd, at the time you served notice on me as the cashier of this company that you levied upon the stock of Jesse and James Seligman in this company, by virtue of an execution in your hands against the parties named, as appears by the ledger and stock transfer books, no stock of this company stood in the name of James Seligman and only one share of the common stock of this company stood in the name of Jesse Seligman, and as you demand and request that I furnish you with a statement of all the stock that appeared at that date in the name of J. & W. Seligman & Co. and Seligman Brothers, London, I comply with your request by making the following statement:

There stood in the name of J. & W. Seligman & Company 5,150 shares of common stock; 2,170 shares of preferred stock; 120 shares of first preferred stock.

There stood in the name of Seligman Brothers 2,840 shares of common stock; 11,730 shares of preferred stock.

I further certify that on the fifth day of October, 1883, I was notified by the secretary of this company that J. & W. Seligman & Company had sold and transferred all their interest in the above stock and were not then the owners of any part of it.

I further certify that the certificates of said stock are now outstanding and have not been returned to this office for transfer.

I have submitted the books of the company to your deputy for inspection.

Yours truly, ALEX. GRAYDON,
Cashier St. Louis & San Francisco R'y Co.

126 *Certificate.*

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, do hereby certify that the above and foregoing is a true copy of the petition filed August 11th, 1881; the summons and sheriff's return on same; motion to quash writ and return, filed October 4th, 1881; order of court, of date March 20th, 1882, allowing James Baker's bill of exceptions to be filed, and said bill of exceptions; also stipulation filed November 20th, 1882; amended answer filed by leave of court December 18th, 1882; reply to same filed, by leave of court, January 5th, 1883; judgment rendered April 2d, 1883, and executions issued upon said judgment to the sheriffs of Jasper county, Lawrence county, Newton county, and city of St. Louis, State of Missouri, respectively, together with the respective sheriffs' returns on each execution, in a certain cause lately pending in the circuit court, city of St. Louis, wherein William C. Wilson is plaintiff and Memphis, Carthage and Northwestern Railroad Company is defendant, being No. 56752 of the files of said court, together with true copies of the motion for execution and affidavit thereto, notice and proof of service, affidavits of James S. Botsford and William C. Wilson as to service of said motion and notice, judgment rendered thereon on the 3rd day of December, 1883, and execution issued upon said last-mentioned judgment, together with the sheriff's return thereon and all accompanying papers thereto attached, in a certain cause lately pending in the circuit court, city of St. Louis, wherein William C. Wilson is plaintiff and Jesse Seligman and James Seligman, stockholders of the Memphis, Carthage and Northwestern Railroad Company, are defendants, being No. 61875 of the files of said court, as fully as all of the above remain on file and of record in my office.

In testimony whereof I have hereunto set my hand and
127 affixed the seal of said court, at office, in the city of St. Louis,
this 24th day of April, 1885.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

That at the times of said several proceedings said Jesse and James Seligman were and ever have been citizens of and residing in the State of New York, and that said notices by plaintiff of his said motion for an execution against them were served upon them at their places of domicile in said State of New York and were not served upon them in the State of Missouri; that they have never been citizens or residents of the State of Missouri; that James O. Broadhead was not attorney for said James and Jesse Seligman or either of them in said cause, nor did said James and Jesse Seligman or either of them appear therein, either in person or by attorney, but made default in said cause.

That in the year 1887, to wit, June 13th, 1887, said Jesse and James Seligman filed in said circuit court a motion to quash an *alias* execution issued on said judgment against them, at the hearing of which motion both parties were present, and said plaintiff Wilson appeared in said circuit court on the hearing of said motion and resisted the same, and thereupon said motion was sustained by an order of said court on September 5th, 1887. Said motion and order are hereby made a part of this finding of facts and are in words and figures as follows:

Motion.

In the Circuit Court, City of St. Louis.

WILLIAM C. WILSON, Plaintiff,
vs.
JAMES and JESSE SELIGMAN, D'f'd'ts.

Now come the defendants, James and Jesse Seligman, and move the court to set aside and quash the pretended execution
128 issued in this case and vacate and set aside the pretended order or judgment rendered in this case, and assigns the following causes therefor:

1. That said pretended judgment is null and void.
2. That process or notice was not served upon the defendants or either of them in the above-entitled cause, nor was any appearance entered therein by either of them, and that the defendants, or either of them, is not and never has been a citizen of the State of Missouri or domiciled therein, but are citizens of the State of New York and domiciled therein, and were at the time of the rendition of the pretended judgment in this case.
3. There is no judgment in favor of the plaintiff and against the defendants authorizing the issuing of the pretended execution in this case, and said pretended execution is null and void.
4. For the reason, by the said pretended judgment and execution, it is sought to deprive the defendants of their property without due process of law and contrary to the provisions of the Constitution of the United States.
5. For the reason that said pretended execution is improvidently

issued in this: It was issued without notice to the defendants or the filing of a motion in this honorable court that said execution issue, and defendants, or either of them, has had no notice of the issue of said pretended execution or of the filing of any motion for the same in this honorable court against them or either of them.

6. For the reason that said pretended execution issued against the defendants without an order of this court authorizing the issuing of same having been made or entered.

* * * * * * *

129 9. Because the defendants, or either of them, has never been served with notice or process within the State of Missouri.

* * * * * * *

13. For the reason that said pretended execution issued without notice to the defendants or the making of an order by this court that the same issue.

14. For the reason that the pretended judgment upon which *which* said pretended execution was issued is null and void, because this court did not acquire jurisdiction of the party defendants, James and Jesse Seligman, or either of them.

15. And for other reasons patent and apparent upon the face of the records and proceedings had in this case, whereby it appears that said pretended execution, judgment, and order are null and void; and wherefore the defendants pray this honorable court to quash said pretended judgment and order upon which said pretended execution was issued, and be held for nought.

J. O. BROADHEAD,
JOHN O'DAY,
Attorneys for Defendants.

Endorsed: "61875. W. C. Wilson, pl'ff, *vs.* Jas. & Jesse Seligman, d'f'd'ts. Motion to set aside judgment & to quash execution. Filed June 13th, 1887. Philip H. Zepp, clerk. J. O. Broadhead & John O'Day, for def'ts."

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

I, Philip H. Zepp, clerk of the circuit court, city of St. Louis, certify the above and foregoing to be a full, true, and complete copy of the motion to set aside judgment and to quash execution and the endorsement thereon in a certain cause wherein William C. Wilson is plaintiff and James and Jesse Seligman are defendants (No. 61875) as fully as the same remains on file in my office.

130 In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 14th day of April, 1888.

[SEAL.] PHILIP H. ZEPP, *Clerk.*

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

In the Circuit Court, City of St. Louis. June Term, 1887.

WILLIAM C. WILSON }
vs. } 61875.
JESSE SELIGMAN *et al.* }

MONDAY, *September 5th*, 1887.

Now, at this day, the motion heretofore filed in this cause to set aside and quash the execution in this cause and to set aside and hold for naught the judgment heretofore rendered in this cause against the defendants herein coming on to be heard, and the matter being fully heard and considered by the court, the court doth sustain said motion. Wherefore it is ordered, adjudged, and decreed that the execution in this cause be quashed and for naught held and the judgment heretofore rendered in this cause be set aside, cancelled, and annulled and for naught held and esteemed; and thereupon the plaintiff submits to the court his motion for a new trial, this day filed, which, being duly considered by the court, is overruled; and on further motion of plaintiff he is given sixty days' time from the date hereof in which to file a bill of exceptions herein.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

131 I, Philip H. Zepp, clerk of the circuit court, city of St. Louis, certify the foregoing to be a true copy of the order of court in the above-entitled cause, as fully as the same remains of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 11th day of April, 1888.

[SEAL.] PHILIP H. ZEPP, *Clerk.*

Conclusions of Law.

On the facts so found the court finds and adjudges that plaintiff is not entitled to recover in this action; to which ruling and judgment of the court the plaintiff excepts.

And, all and singular the premises being seen and heard, it is considered, ordered, and adjudged by the court that the plaintiff take nothing by his suit in this behalf herein and that the defendant have judgment and go hence without day, together with his costs in this behalf expended.

Thereupon plaintiff filed a motion for a new trial, which, being seen and heard by the court, is overruled; to which ruling of the court plaintiff at the time excepts.

It is further ordered by the court that the foregoing finding of facts and conclusion of law be, and the same is hereby, made a part of the record of this case with said judgment and as a part thereof.

And now the said plaintiff tenders to the court a bond for costs and a writ of error to the Supreme Court of the United States, and thereupon said bond is approved and said writ is allowed. Thereupon plaintiff files a citation.

Sept. 17, '88.

DAVID J. BREWER,
Circuit Judge.

Said appeal bond is in words and figures following, to wit:

132 Know all men by these presents that *we*, William C. Wilson, are held and firmly bound unto Jesse Seligman in the full and just sum of five hundred dollars, to be paid to the said Jesse Seligman, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the September term, A. D. 1888, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between William C. Wilson, plaintiff, and Jesse Seligman, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jesse Seligman citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said William C. Wilson shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

WILLIAM C. WILSON. [SEAL.]
JOHN M. WILSON. [SEAL.]
ALEXANDER D. WILSON. [SEAL.]

Approved by—
D. J. BREWER,
Circuit Judge.
Sept. 17, '88.

133 [Endorsed:] No. 2898. United States circuit court, eastern division of the eastern judicial district of Missouri. William C. Wilson *vs.* Jesse Seligman. Bond, $500.00. Wm. C. Wilson, principal. Sufficient. John O'Day. Filed 17th day of Sept., 1888. A. P. Selby, clerk.

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

WILLIAM C. WILSON *vs.* JESSE SELIGMAN.

BREWER, *C. J.:*

The facts in this case are these: Plaintiff, in the circuit court of the city of St. Louis, on April 2, 1883, recovered a judgment against the Memphis, Carthage and Northwestern Railroad Company, a corporation created under the laws of the State of Missouri, for $72,799.38. Execution was issued on such judgment and returned unsatisfied. On the 9th day of July, 1883, a motion in writing was filed in the said court for an order directing the issue of an execution against this defendant as an alleged stockholder in such corporation under the provisions of section 736 of the Revised Statutes. The defendant being a non-resident, and not found within the State, notice of this motion was served upon him personally in the State of New York, the place of his residence. Notice was also published by posting in the clerk's office in St. Louis. On the 3rd day of December, 1883, defendant not appearing, the motion was sustained and execution ordered in favor of the plaintiff against the defendant. Thereafter, on the 9th day of May, 1887, a suit was commenced in the circuit court of St. Louis by this plaintiff against this defendant upon such judgment and order. Defendant, being within the State, was served personally. Thereupon the case was transferred to this court, and the single question now presented is whether the State court had jurisdiction of the person of the defendant, a non-resident of and not found within the State
135 and served by personal notice in the State of New York.

The effect of this proceeding, if sustained, is to subject a non-resident, having no property within this State, to a personal judgment when he is not served within the State and only served by process going out of the courts in this State into the territorial jurisdiction of another; but for the fact that the defendant is alleged to have been at the time a stockholder in the corporation against which judgment was rendered there would be no room for question. The case of Pennoyer *vs.* Neff, 95 U. S., 714, would be decisive. In that case the court says: "But where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely *in personam*—constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State wherein the tribunal sits cannot create any greater obligation upon a non-resident to appear. Process sent to him out of the State and process published within it are equally ineffectual in proceedings to establish his personal liability."

But the argument is that a corporation derives all its franchises and powers from the State of Missouri, and that in creating such corporation the State has prescribed the liability of all its stockholders and the methods of enforcing such liabilities; that whoever takes stock in such corporation takes it subject to such conditions and assents to the enforcement of liability in the manner prescribed; that the circuit courts of the State of Missouri are courts of general original jurisdiction, and their findings upon the jurisdictional fact that the defendant was a stockholder cannot be collaterally questioned.

136 Elaborate briefs have been filed *pro* and *con*. If I do not enter into any extended discussion it is not because the field is not ample and authorities abundant, but because from the amount in controversy and the past history of similar litigation I know the case will go to the Supreme Court, and extended discussion here would be superfluous. I am content to simply state my views. In the light of the Pennoyer *vs.* Neff — process issued from the courts in this State has no potency outside of its territorial limits. Before any adjudication can be made against a party that party must be subject to the jurisdiction of the court. Before the court had any authority to inquire whether defendant was a stockholder it must have the defendant in court. No adjudication even of the matter of jurisdiction can effect a party who is not before the court. There is no presumption here from the silence of the record in favor of the judgment of a court of general jurisdiction, for the manner of service is disclosed. It may be, as a matter of fact, defendant was a stockholder, though that fact is denied; but the same argument which would sustain this judgment against defendant would sustain a similar judgment against any man, living wheresoever he might, upon whom plaintiff might see fit to serve notice and against whom he might make some *prima facie* showing. So far as all interests which any stockholder may have in a Missouri corporation are concerned, they may be reached by process against the corporation served in any manner or at any place that the State may authorize, but so far as any personal liability is concerned it cannot be adjudged against any individual until the fact that he is a stockholder is determined by some competent tribunal having previously thereto acquired jurisdiction of his person. With these views judgment must be entered for the defendant.

137 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2898, of William C. Wilson, plaintiff, against Jesse Seligman, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this twenty-fifth day of September, in the year of our Lord eighteen hundred and eighty-eight.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2898. United States circuit court, eastern division of the eastern judicial district of Missouri. William C. Wilson against Jesse Seligman. Duly certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 1231. William C. Wilson, plaintiff in error, *vs.* Jesse Seligman. Filed October 8, 1888.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1891.

WILLIAM C. WILSON, *Plaintiff in Error,* *against* **JESSE SELIGMAN,** *Defendant in Error.*	}	**No. 177.**

Error to the Circuit Court of the United States
for the Eastern District of Missouri.

Statement, Assignment of Errors, Brief and Argument for Plaintiff in Error.

JAMES S. BOTSFORD,
MARCUS T. C. WILLIAMS,
For Plaintiff in Error.

KANSAS CITY, MO.:
SIDNEY F. WOODY, PRINTER, 615 DELAWARE ST.
1891.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

WILLIAM C. WILSON,
Plaintiff in Error,
against
JESSE SELIGMAN,
Defendant in Error.

No. 177.

STATEMENT.

This is a suit at law, by said Wilson, as plaintiff, against said Seligman, as defendant, to recover $69,443.80, with interest, on a judgment given in the Circuit Court for the City of St. Louis, Missouri, in favor of Wilson against Seligman. There was a written waiver of a jury trial, and the cause was submitted to the court on the pleadings, evidence and arguments of counsel. The court, by Justice BREWER, who tried the case, made and entered of record a special finding of facts, and gave final judgment for defendant, and Wilson brings the case to this court by writ of error.

The question in the case is, whether the Circuit Court of the City of St. Louis, Missouri, had jurisdiction to give said judgment in favor of Wilson and against Seligman on which this action was brought. If said circuit court did not have jurisdiction to give that judgment, then the judgment of the court below in this case, holding that judgment to be void, should be affirmed. If, on the contrary, said circuit court had jurisdiction to give that judgment, then that judgment was and is valid, and the judgment of the court below in this case should be reversed and the cause remanded with directions to the court below to give judgment for Wilson for the balance due on said judgment sued on herein. The facts found by the court and shown by its finding of facts made a part of the record, with the judgment herein by the court below in this case, are as follows:

On April 2, 1883, the plaintiff, Wilson, recovered a judgment in said St. Louis Circuit Court for the sum of $72,799.38, with interest and costs, against the Memphis, Carthage and Northwestern Railroad Company, a corporation which before that time had been created under the general incorporation and railroad laws of the State of Missouri. The said St. Louis Circuit Court, which gave that judgment, is a court of general common law jurisdiction, and said judgment therein was given in a suit by said Wilson in which said railroad company was served with a writ of summons, and in which said company appeared and filed its answer, and was present at and participated, by counsel, in the trial of that case.

On April 7, 1883, four executions were issued on said judgment against said railroad company to the sheriffs of the four counties in which said company had been organized to build its railroad and had its chief office, all of which executions were returned to said circuit court on or before June 4, 1883, by the sheriffs of said four counties, that no property or effects of said company could be found on which to levy said executions, and said company, at the time of the rendition of said judgment against it, was and ever since has been insolvent.

At the time of the incorporation of said railroad company, there was and ever since has been in force in the State of Missouri the following section, which is a part of the general corporation law of Missouri, under which said corporation was incorporated:—

"SECTION 2517. If any execution shall have "been issued against any corporation, and there "cannot be found any property or effects whereon "to levy the same, then such execution may be issued against any of the stockholders to the extent "of the amount of the unpaid balance of such stock "by him or her owned: *provided always*, that no "execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceedings shall have been "brought or instituted, made upon motion in open "court, after sufficient notice in writing, to the person sought to be charged; and upon such motion "such court may order execution to issue accordingly: *and provided further*, that no stockholder "shall be individually liable in any amount over "and above the amount of stock owned." (Rev. Stat. Mo. 1889, Vol. 1, p. 633.)

After the said returns to said circuit court had been made of said four executions, that no property or effects of said corporation could be found whereon to levy said executions, to-wit, on July 9, 1883, said plaintiff Wilson filed in said circuit court which gave said judgment and issued said executions against said railroad company, a motion in writing, stating the foregoing facts, and further averring that James Seligman and said Jesse Seligman were the holders of stock in said railroad company to the extent of six million dollars, of which the sum and balance of five million dollars remained wholly unpaid and was due as the assets and property of said railroad company. Said motion concluded with a prayer for an order for executions against said Seligmans for the amount of said judgment against said company, and was sworn to by plaintiff, Wilson. Notice of said motion was served on each of said Seligmans in the city and State of New York, where for more than twenty years said Seligmans have been residents and citizens, by delivering personally to each of said Seligmans in said city of New York a copy of said motion, with a written notice notifying them that on the first day of October, 1883, said motion would be presented to said circuit court, and that plaintiff would ask that said motion be granted.

Said service was made on said Seligmans July 2, 1883.

No notice was served on either of said Seligmans in the State of Missouri, and neither of them have resided in or been citizens of that State.

Said motion for executions against said Seligmans having been reached for trial by said circuit court, and said Seligmans failing to enter their appearance thereto, either in person or by counsel, said motion on the notice so served was taken up and heard on the evidence adduced by plaintiff, Wilson, and afterwards, on December 3, 1883, said circuit court gave the final judgment on which this action is founded sustaining said motion; said judgment being in words and figures as follows:—

JUDGMENT.

"WILLIAM C. WILSON,
vs.
"MEMPHIS, CARTHAGE AND NORTH-WESTERN RAILROAD COMPANY. } 61875.

"On motion for execution against Jesse and "James Seligman.

"Monday, December 3rd, 1883.

"Now at this day comes the plaintiff, by his "attorney, but the said Jesse and James Seligman, "although called, failed to appear, and the plaintiff's motion for an execution against said Jesse "Seligman and James Seligman coming on to be "heard, is submitted to the court on the proofs adduced in support of said motion and the argument of counsel for plaintiff and of Messrs. "Broadhead and Haeussler, as friends of the court, "and the court, having fully heard and considered "the same, doth find that the plaintiff on the 2nd "day of April, 1883, recovered a judgment against "the Memphis, Carthage and Northwestern Railroad Company, in this court, for the sum of "$72,799.38 damages and costs; that thereafter, "to-wit, on the 7th day of April, 1883, plaintiff "caused executions to issue against said railroad "company, but that no property, goods, or chattels "of said defendant could be found or can be found "whereon to levy said executions, and the same "were returned accordingly *nulla bona;* and the "court does further find that at the date of the "rendition of the judgment and the issue and return of said executions, Jesse Seligman and James "Seligman, defendants in this motion; were stock-

"holders of said Memphis, Carthage and North-"western Railroad Company, owning and holding "as such 60,000 shares of the stock of said company, "of the par value of $100.00 each; that there "remains unpaid upon said 60,000 shares of stock "the sum of $5,000,000.00, and that there remains "due and unpaid upon said judgment of plaintiff "the sum of $75,838.00, and that said Jesse Selig-"man and James Seligman are liable to the execution "of plaintiff in the said sum of $75,838.00. It is "ordered by the court that said motion be sustained "and that execution issue in favor of said plaintiff "against said Jesse Seligman and James Seligman "for the sum of seventy-five thousand eight hundred "and thirty-eight dollars and the costs of these pro-"ceedings under the motion of plaintiff, and the "court having read the plaintiff's affidavit this day "filed, it is further ordered that said execution issue "forthwith."

On this judgment there is a credit of $6,394,20, to which the defendant is entitled, but the balance of said judgment of $75,838.00 remains wholly due and unpaid.

This judgment was given against the Seligmans at the December term, 1883, of said circuit court, and at the June term, 1887, of said court a motion to quash an *alias* execution issued on said judgment, which motion was filed at said last term, was sustained by said circuit court.

The petition of plaintiff in this case, which is founded on the facts so specially found by the court in its finding of facts at the trial, may be found at pages 3, 4 and 5 of the Record. The answer of defendant Jesse Seligman in this case may be found at pages 9, 10, 11 and 12 of the Record.

The special finding of facts may be found in the Record, from pages 14 to 87 thereof. Said finding of facts concludes in the following words:—

"On the facts so found the court finds and "adjudges that plaintiff is not entitled to recover "in this action, to which ruling and judgment of "the court the plaintiff excepts.

"And all and singular the premises being seen "and heard, it is considered, ordered and adjudged "by the court that the plaintiff take nothing by his "suit in this behalf herein, and that the defendant "have judgment and go hence without day, together "with his costs in this behalf expended.

"Thereupon plaintiff filed a motion for a new "trial, which, being seen and heard by the court, is "overruled, to which ruling of the court plaintiff at "the time excepts.

"It is further ordered by the court that the "foregoing finding of facts and conclusion of law be "and the same is hereby made a part of the record "of this case with said judgment, and as a part "thereof."

In deciding the case, Justice BREWER gave a written opinion, which may be found at pages 88 and 89 of the Record.

WILLIAM C. WILSON, *Plaintiff in Error.*
vs.
JESSE SELIGMAN, *Defendant in Error.*
No. 177.

ASSIGNMENT OF ERRORS.

And now at this day comes said plaintiff in error and assigns the following errors committed by the court below in the decision of this cause, viz.:—

I.

The court below erred in giving judgment on the facts found by the court for the defendant and against the plaintiff, and in not giving judgment for the plaintiff and against defendant for the amount remaining unpaid on said judgment against said Seligmans, with interest and costs.

II.

The court below erred in overruling plaintiff's motion for a new trial.

III.

The court below erred in holding that a circuit court in the State of Missouri in which a judgment had been given, and an execution had been returned *nulla bona* against a Missouri corporation, could not on a written motion and notice, served personally on a stockholder therein, at his domicile in another State, exercise jurisdiction over such stockholder and give judgment for the award of an execution against him for such portion of his unpaid stock as might be necessary and sufficient to pay plaintiff's judgment.

IV.

The court below erred in holding and adjudging that said judgment of said St. Louis Circuit Court, in favor of said plaintiff in error against said Seligmans, was and is null and void, and in not holding such judgment to be valid and binding.

Wherefore said plaintiff in error prays this court to reverse the judgment of the court below in this cause, and to remand this cause to the court below with directions to give judgment for plaintiff for the amount remaining due and unpaid on said judgment sued on in this action.

JAMES S. BOTSFORD,
M. T. C. WILLIAMS,
For Plaintiff in Error.

POINTS OF FACT.

The findings of the trial court conclusively establish the following propositions of fact.

I.

That on April 2, 1883, plaintiff recovered a judgment for the sum of $72,799.38 against the Memphis, Carthage and Northwestern Railroad Company, a corporation before that time incorporated under the laws of the State of Missouri, in the Circuit Court of the City of St. Louis, Missouri, which court is a court of general common law jurisdiction and had jurisdiction over the parties to and subject matter of the suit in which said judgment was rendered, and on and before June 4, 1883, executions had been issued out of, and returned *nulla bona* to, said court, on said judgment, and that that judgment is still unpaid.

II.

That at the dates of the rendition of said judgment and of the issue and return of said executions said Jesse Seligman and James Seligman were stockholders in said railroad company in the sum of $6,000,000, on which stock the sum of $5,000,000 remained due and unpaid. This fact was found by said circuit court in its judgment against said Seligmans set out in full in the foregoing statement and to be found at page 76, Printed Record, and no evidence was offered by the defendant in this case to either disprove or in any respect qualify said fact so found and adjudged by said court in said judgment, that said Seligmans were such stockholders in said company and as such owed $5,000,000 on said stock.

III.

That on a written motion filed in the said suit against said company in said circuit court asking judgment against said Seligmans as such stockholders for executions against them for the amount of said judgment against said company, and a written notice of such motion served personally on July 2, 1883, on each of said Seligmans in the city and State of New York, of which they were residents and citizens, notifying them that such motion would be presented at the October term, 1883, of said court, said circuit court on December 3, 1883, gave final judgment by default in favor of plaintiff against said Seligmans, on which the sum of $69,443.80 remains due and unpaid to plaintiff.

POINT OF LAW.

Can a circuit court in the State of Missouri which has given a judgment against a Missouri corporation on which an execution has been issued and returned *nulla bona*, take cognizance of a motion against any of the stockholders, resident or non-resident, of such insolvent corporation, for the purpose of determining whether such stockholder is indebted for his stock, and for the purpose of giving judgment against any stockholder who may be found in arrears on his stock, personal notice in writing having been given of the motion a sufficient length of time before its presentation to any of the resident stockholders in this State, and to any of the non-resident stockholders at the place of their domicile in the State where they reside.

BRIEF AND ARGUMENT.

I.

Jurisdiction to entertain a motion to award an execution on a judgment against an insolvent Missouri corporation, after a return of an execution *nulla bona* against the corporation, exists if the party proceeded against by the motion be a stockholder in such insolvent corporation.

The express provision of the statute which confers the jurisdiction is (§ 2517, R. S. 1889):—

"If any execution shall have been issued "against any corporation, and there cannot be "found any property or effects whereon to levy "the same, then such execution may be issued "against *any of the stockholders.*"

The question, whether the stockholder proceeded against owes for his stock, is one to be tried by the court. But his liability to pay, which must be determined by the court on the trial of the motion, is not a jurisdictional fact to be inquired into or found before the court can entertain the motion. A judgment by default on a motion against a stockholder duly notified according to the provision of the statute, by "sufficient notice in writing to the person sought to be charged," would be valid, even if the stockholder proceeded against had, in point of fact, paid for his stock in full, or if he held his stock as collateral security for a debt, or *in escrow*, or in some other qualified way, so as to result in his being held not liable to pay for his stock if he had shown the fact to the court as a defense to the motion, instead of suffering a judgment by default to go against him.

II.

The reason why jurisdiction exists to award an execution on a mere motion against a stockholder of an insolvent corporation, after judgment and return, *nulla bona*, of an execution, is that the stockholder is a mem-ber of the corporation, and for the purposes of the remedy by motion for an execution against him, he is brought into court by the process of summons against the corporation of which he is a member. A suit against a corporation is a suit against all its members.

This has long been the settled law of the Supreme Court of the United States, and is the ground on which the very extensive jurisdiction of the Federal courts over corporations is maintained. And in Thompson on Liability of Stockholders, § § 326, 327, it is said:—

"Statutes which permit an execution on a judgment against a corporation to be levied of the body and goods of a stockholder are not unconstitutional. They are not to be deemed to authorize a man's estate or body to be taken without a judgment against him, or without a hearing in the action upon which the judgment was rendered. If they were so, they would undoubtedly be void. *But on the contrary, all who are members of the corporation are virtually defendants in the action and have an opportunity to be heard in the form they have chosen by joining the company.*"

And in the case of *McClaren v. Franciscus*, 43 Mo. 465, where the statute set out in the foregoing statement, under which the said circuit court gave judgment on motion against the Seligmans, was considered, the Missouri Supreme Court says:—

"A corporation is a permanent body, with the qualities of succession and perpetuity; its members may die or be changed by transference of stock, but it remains the same. The legislature and the constitution intended that the property of this body should at all time be liable for the debts contracted by it. *For this purpose the corporation was made liable to be sued, and lest at any time the corporation should fail to pay its debts, a remedy was applied against that tangible body which at all times must be appended to it: namely, the members.*"

In view of these authorities, the process of summons which issued in the suit of plaintiff against the Memphis and Carthage corporation must be regarded, in effect, for the purpose of the remedy by motion against the Seligmans as stockholders and members of that corporation, as process against them which gave the court jurisdiction over them as such stockholders and members on the filing of such motion against them. It has often been decided that a judgment against a corporation is binding and conclusive on the stockholders.

Corse v. Sanford, 14 Iowa, 235.
Milliken v. Whitehouse, 49 Me. 527.
Wilson v. Coal Co., 43 Pa. St. 424.
State ex rel. v. Rainey, 74 Mo. 229.
Morawetz on Priv. Cor. § 619.
Thompson on Liability of Stockholders, § 329.

A stockholder is bound by the suit and judgment against the corporation so far as the judgment may absorb the common property in which he is interested as a member of the corporation, and he is further bound by being liable to be called upon to respond to a motion for judgment against him in the event that, on the issue of an execution against the corporation, it proves to be insolvent.

It cannot be maintained that the stockholder is bound by the judgment against the corporation on the ground of privity between the stockholder and the corporation, for the reason that the stockholder does not succeed to the rights of the corporation in the subject of the action either as a privy in law, blood or estate. The stockholder must, therefore, be bound by the judgment against the corporation on the ground that he is a member of the corporation, and that he and the other members are parties to the suit against the corporation and are represented in court by the corporation which they, the members, created and which they compose. Corporations are divided into two classes; namely, corporations sole and corporations aggregate. The ordinary railroad or business corporation is an association or an aggregation of its members into one body. Where jurisdiction may be exercised over a corporation, it would seem that power to exercise jurisdiction over its members may also be given. And where jurisdiction is given to render a judgment against a corporation, that jurisdiction does not end and is not exhausted by the rendition of the judgment, but remains until the judgment is satisfied, either out of the property of the corporation or its members, by a proceeding conducted according to law. This is shown by the course of decisions in this court, where it has long been settled that a judgment against a municipal corporation may be enforced by the court issuing a mandamus as process of execution to compel the tax-payers to pay the judgment.

State ex rel. v. Rainey, 74 Mo. 229.

III.

A notice in Missouri is not process or the substitute for process. In that State parties are brought into court and judgments given against them on process, of summons duly issued out of court, returnable on a day fixed by law, and served by an officer of the law on the party in the manner directed by law. The summons must issue and be served in the county in which the defendant resides. If the notice which is given to the stockholder be process, the court could only take jurisdiction over such stockholders as live in the county of the court in which the judgment against the corporation has been rendered.

The statute provides that the notice to the stockholder of the motion for execution against him shall be "sufficient notice in writing to the person sought to be charged."

There is no requirement that this notice must issue out of court or be served by an officer. That this notice is neither process nor the substitute for process is shown by the fact that the statute as originally enacted in 1855 provided that the sheriff might levy the execution issued against the corporation on the property of a stockholder to the extent of his statutory liability without any order of court, and consequently without any notice of any court proceeding against him.

The statute of 1855 above referred to is Sections 13 and 14 of the General Corporation Law, pages 372 and 373 of Volume 1, Mo. Rev. Stat. 1855, which sections read as follows:—

"SECTION 13. In all corporations hereafter "created by the legislature, unless otherwise speci- "fied in their charter, in case of deficiency of cor- "porate property or estate liable to execution, the "individual property rights and credits of every "member of the co-partnership, or body politic, "having a share or shares therein, shall be liable "to be taken on execution, to an additional "amount, equal to that of the amount of his stock, "and no more, for all debts of the corporation con- "tracted during his ownership of such stock; and "such liability shall continue, notwithstanding "any subsequent transfer of such stock, for the "term of one year after the record of the transfer "thereof on the books of the corporation, and for "the term of six months after judgment recovered "against such corporation in any suit commenced "within the year aforesaid: *provided*, that in "every such case the officer holding the execution "shall first ascertain and certify upon such execu- "tion that he cannot find corporate property or "estate.

"SECTION 14. In such case the officer may "cause the property of such stockholder to be "levied upon, by execution, in the same manner as "if the same were against him individually, after "giving him forty-eight hours previous notice of his "intention, and the amount of the debt or deficiency, "if he resides within the county, or, if not within "the county, to his agent, if he have any within the "county, otherwise to the clerk or cashier, or some "other officer of the corporation, unless such stock-"holder, his agent, or the clerk, or other officer, on "demand, and notice as aforesaid, shall disclose, "and show to the execution creditor or the said "officer, corporate property or estate, subject to ex-"ecution, sufficient to satisfy said execution and all "fees."

This statute clearly proceeds on the theory that the suing of a corporation brings into court the members of whom it is composed. The provision of the statute is that the execution shall be levied on the property of the stockholders, the same as if it were against him individually. The judgment and execution, while primarily against the corporation, are to be regarded as a judgment and execution against the stockholders in case there can be found no sufficient property of the corporation to satisfy the same.

It is true that while these sections were in force, the stockholder was under a statutory liability to creditors of the corporation for an amount equal to and in addition to his stock. Now he is only liable for his unpaid stock. But the difference in the nature and extent of his liabilty to corporate creditors does not change his relation to a suit and judgment against the corporation of which he is a member.

If, under the foregoing statute of 1855, the stockholder is in court in the suit and judgment against his corporation, for the purpose, if necessary, of enabling the creditor to collect his debt from the stockholder's statutory liability, no reason is perceived why the stockholder is not now in court in the suit and judgment against his corporation for the purpose of being called upon to respond from his unpaid stock.

In the Revised Statutes of Missouri for 1865 the foregoing statute of 1855 was so changed as to allow the stockholder to be heard in court before awarding execution against him. The change thus made has ever since been in force, the statute of 1865 being the one hereinbefore recited, under which the judgment of the St. Louis Circuit Court against the Seligmans was given. In speaking of this change in 1865 in the law requiring an order of the court, the Missouri Supreme Court, in *Skrainka v. Allen*, 76 Mo. 391, use the following language:—

“There was an obvious propriety in changing
“the law so as to require the judgment creditor to
“apply to the court for execution against the stock-
“holder, instead of leaving that matter to the judg-
“ment and discretion of the officer having the ex-
“ecution, as was provided by the law of 1855, inas-
“much as all the questions affecting the relations
“of the stockholder to the corporation and its cred-

"itors can, as the law now stands, be investigated "and determined before the execution is issued and "the property of the stockholder is sold."

This language does not indicate that the court regarded the notice to the stockholder as being process necessary to bring him into court, but that the award by judgment of the court of an execution against the stockholder upon motion and notice to him, was a more orderly proceeding than the levy by the officer, under the law of 1855, of the execution against the corporation on the property of the stockholder contemplated.

Statutes like the above cited one of 1855 are not in violation of the constitutional prohibition against taking private property without due process of law. (Thompson on Liability of Stockholders, §§ 326, 327; Morawetz on Private Corporations, § 618.)

IV.

The motion for execution against a stockholder is not a suit at law or in equity, but a mere sequence, dependency or supplemental proceeding to and a part of the suit in which the motion is filed and based on the statute as a means of enforcing the judgment therein. (*Weber v. Humphreys*, 5 Dill. Cir. Ct. Rep. 223 and 227, where Judge DILLON held that a motion for execution against a stockholder is not removable to the Federal courts.) The statute does not contemplate that an answer should be filed to the motion. (*Bray v. Seligman*, 75 Mo. 40.) And the motion is not triable by a jury, but by the court, like any other motion in the cause in which it is filed. (*Schaffer v. Phœnix Brewing Co.*, 4 Mo. App. Rep. 115, 119.) The motion for execution against the stockholder is made in open court in the suit against the corporation, and is not cognizable in any other court than the one which has taken cognizance of the suit and given judgment against the corporation.

V.

The foregoing considerations demonstrate, as we think, that the St. Louis Circuit Court which acquired jurisdiction over the suit and gave judgment against the Memphis, Carthage and Northwestern Railroad Company, thereby acquired jurisdiction over the stockholders of that company for the purpose, after the return of an execution *nulla bona*, of entertaining a motion for execution against any of such stockholders, and if the Seligmans were stockholders in that company, then it follows that said court acquired jurisdiction over them, as such stockholders. The judgment awarding execution against the Seligmans sued on in this action expressly adjudges and recites that they were stockholders in that company to the extent of $6,000,000, and no showing is made or attempted by defendant in this case, that they were not such stockholders. We do not contend that that recital of the jurisdictional fact that they were stockholders is conclusive in the sense that the defendant could not have shown otherwise in this action, but having wholly failed to make any showing in this case, that recital in the judgment, which before was merely *prima facie*, now becomes conclusive of the jurisdictional fact.

If Smith, a citizen of New York, is sued in the courts of that State on a judgment given against him in a court at Chicago, and shows in defense that he was never in the State of Illinois, but the judgment roll recites that his appearance to the suit in Chicago was entered by an attorney of that court, and he makes no showing when sued in New York that the Chicago attorney had no authority to enter his appearance, the recital in the judgment of the jurisdictional fact that he appeared by attorney, becomes binding and conclusive. So here, the defendant having failed to show that he was not a stockholder in the Carthage Company, the recital of that jurisdictional fact in the judgment against him becomes alike binding and conclusive. If it be contended that the court could only adjudge that he was a stockholder in a suit at law against him in which he was personally served with process of summons, as in any other case, the answer is that the statute authorizes the court which has given judgment against the corporation, to proceed against any stockholder, not by suit, but by motion and personal notice, and the power thus to proceed necessarily involves the authority, and gives the court the right, and imposes on it the duty, to determine that the person proceeded against on such motion and personal notice is a stockholder.

If the defendant had desired to contest the fact that he was a stockholder, he should have made a showing of the fact on the trial of the cause in the court below. The remarks of this court in the case of *Thompson v. Whitman*, 18 Wall. 464, are in point:—

"The case of *Landes v. Brant*," says Mr. Justice Bradley, speaking for the court, "has "been quoted to show that a judgment cannot be "attacked in a collateral proceeding. There a "judgment relied on by defendant was rendered "in the Territory of Louisiana in 1808, and the "objection to it was that no return appeared upon "the summons, and the defendant was proved to "have been absent in Mexico at the time; but the "judgment commenced in the usual form. 'And "now at this day come the parties aforesaid by "their attorneys,' etc. The court pertinently "remarked that the defendant may have left "behind counsel to defend suits brought against "him in his absence, but that if the recital was "false and judgment voidable for want of "notice, it should have been set aside by *audita* "*querela* or motion in the usual way, and "could not be impeached collaterally. Here "it is evident the proof failed to show want "of jurisdiction. *The party assailing the* "*judgment should have shown that the counsel who* "*appeared were not employed by the defendant,* "*according to the doctrine held in the cases of* "*Shumway v. Stillman, Aldrich v. Kinney, and* "*Price v. Ward.* The remark of the court, that "the judgment could not be attacked in a collateral proceeding, was unnecessary to the decision, and was in effect overruled by the subsequent cases of *D'Arcy v. Ketchum*, and *Webster v. Reid.*

We submit, therefore, that it must be taken as established that the Seligmans were stockholders in the Carthage Company to the extent of $6,000,000 as adjudged and recited in the judgment against them.

The effect of the recital and adjudication in the judgment against the Seligmans, that they were stockholders, would have been the same if they had been served with notice of the motion in Missouri instead of New York. The grounds of jurisdiction are the same under the statute which confers it, and it is wholly immaterial under the statute where the notice is served. The statute confers the same jurisdiction over one stockholder as over another, and recognizes no distinction between them.

The judgment against the Seligmans contains the following further adjudication and recital:—

"That there remains unpaid upon said 60,000 "shares of stock the sum of $5,000,000, and that "there remains due and unpaid upon said judgment "of plaintiff the sum of $75,838.00, and that said "Jesse Seligman and James Seligman are liable to "the execution of plaintiff in the said sum of "$75,838.00."

There is no showing in this case that any fact stated in that recital is untrue, but while it was necessary to find those facts in order to give judgment against the Seligmans, it was not necessary to make those findings as jurisdictional facts. The fact that they were stockholders gave the court jurisdiction to determine the fact and extent of their liability. Whether a party who holds stock in a corporation holds it absolutely or as collateral security or *in escrow*, or in some other qualified way, and whether, if the court finds that the stock is so held, the stockholder under the terms of his contract with the company is liable to pay for it, and whether any of the stock remains unpaid, and if so, how much, are all questions which must be tried and determined by the court by reference to all the facts, including the contract between the stockholder and the company, when put in evidence and considered in connection with the statutes of the State on the subject of stock and corporations. And the power to determine these questions was vested in the Missouri courts by the statute in question, which provides that the judgment creditor of the corporation may "proceed against any of the stockholders by motion in open court after sufficient notice in writing to the person sought to be charged." Jurisdiction does not involve the idea that the defendant must on the trial be found liable, in order for the jurisdiction to exist, but proceeds in this, as in all cases, upon the simple proposition that the court to which it is given shall, proceeding according to the statute which creates the jurisdiction, hear, consider and determine, and give judgment according to the law applied to the facts of the particular case, for or against "the person sought to be charged."

In this case the jurisdictional fact that the Seligmans were stockholders having been adjudged by the court and not now shown to be untrue, the judgment by default against them in a proceeding conducted according to the statute could not be impeached or held void, even if it were shown either on the law or facts that they were not liable to pay for their stock under their contract with the company under which the stock was issued to them, or if it were shown, conceding their liability to pay, that they had paid for their stock in full before the judgment was rendered against them. If they were stockholders in the company, but could have shown that they had paid for their stock, or that they were not liable to pay for it at all under their contract with the defendant company, they should have appeared and shown those facts, after being notified several months of plaintiff's motion against them, in the court which had jurisdiction over them as such stockholders to try those facts, instead of suffering judgment by default to go against them.

VI.

The stock of the Seligmans in the Memphis and Carthage corporation was created under the laws of the State of Missouri. Although the Seligmans were citizens and residents of the State of New York, their stock in that corporation was in all respects subject to the laws of Missouri, and not to the laws of New York. It was transferable only in Missouri on the books of the corporation at its chief office in that State.

Constitution of Mo., Art. 12, Sec. 15.
Morawetz on Corporations, § § 321–325.
State v. Railroad Co., 45 Wis. 579.
Story on Conflict of Laws, § 383.

It was subject to execution sale in Missouri on a judgment against them in that State.

Rev. Stat. of Mo. 1889, Vol. 1, §§ 4924, 4925.

Their stock in that corporation was subject to taxation in Missouri, although their domicile was in another State.

Tappan v. Bank, 19 Wall. 490.
Curtis v. Ward, 58 Mo. 295.
2 Mo. Rev. Stat. 1879, §§ 6692–6694.

That stock, if unpaid, as the court found and adjudged, was a trust fund of the corporation, payable either to the corporation in Missouri or to a judgment creditor of the corporation in that State. Therefore, although the Seligmans were citizens of New York, their stock in that company was brought into existence under the statutes of, had its *situs* in, and, with their liability to pay for it, was amenable to the laws of Missouri, and not of New York.

The unpaid stock of that company constituted a portion of its assets and property in the State of Missouri which the creditors of the company had the right to subject to the payment of their debts.

Buford v. Strother, 3 McCrary, 256.
Morawetz on Corporations, § 575.

It follows that the unpaid stock of the Seligmans in the Memphis and Carthage corporation, and their liability to pay therefor, having their *situs* in and being subject to the laws of Missouri, it was competent for those laws, in the creation of the stock and the liability to pay for it, to make both the stock and that liability subject to the jurisdiction of the courts of the State which brought the stock and the liability to pay for it into existence.

VII.

The Seligmans having come into the State of Missouri and contracted with a Missouri corporation, and having taken stock therein under the laws of Missouri, they became sharers in the profits, franchises, rights, liabilities and conditions created and imposed by those laws equally with the other stockholders of the company, wholly unaffected by the question of the residence of themselves or of the other members of the company.

It has been the doctrine of this court for fifty years that all the stockholders of a corporation are conclusively presumed to be citizens of the State which created the corporation.

See *Muller vs. Dows*, 94 U. S. 445, where it is said:—

"A suit may be brought in the Federal courts "by or against a corporation, but in such case, "*it is regarded as a suit brought by or against the* "*stockholders of the corporation;* and for the pur- "poses of jurisdiction, it is conclusively presumed "that all the stockholders are citizens of the State "which, by its laws, created the corporation."

In the language of Judge **Drummond**, in the case of *Payson v. Withers*, 5 Bissell, 278, the non-resident stockholder casts off for the time being the vesture of his own State, and puts on that of the State which created the corporation in which he becomes a stockholder. See also Thompson on Stockholders, Sec. 80. In the case of *Canada Southern Railway Company v. Gebhard*, 109 U. S. 527, it was ruled by this court that—

"When the Parliament of the Dominion of "Canada authorizes a corporation, existing under "its authority, to enforce upon its mortgage creditors a settlement by which they are to receive "other securities of the corporation in place of "their mortgage bonds, and the scheme is assented "to by a large majority of bondholders, and goes "into effect, and the right of citizens of the United "States who are bondholders to participate in the "reorganization on the same terms as Canadians or "other British subjects is preserved and recognized, the settlement is binding upon bondholders who are citizens of the United States, and "who sue in the courts of the United States to "recover on their bonds."

In that case Mr. Chief-Justice **Waite**, speaking for this court, says, at page 536:—

"That the laws of a country have no extra-"territorial force is an axiom of international jur-

"isprudence, but things done in one country under "the authority of law may be of binding effect in "another country. The obligor of the bonds and "coupons here sued on was a corporation created "for a public purpose; that is to say, to build, "maintain, and work a railway in Canada. It had "its corporate home in Canada, and was subject to "the exclusive legislative authority of the Dominion Parliament. It had no power to borrow "money or incur debts except for completing, "maintaining, and working its railway. The "bonds taken by the defendants in error showed on "their face that they were a part of a series "amounting in the aggregate to a very large sum "of money, and that they were secured by a trust "mortgage on the railway of the company, its "lands, tolls, revenues, etc. In this way the "defendants in error, when they bought their "bonds, were, in legal effect, informed that they "were entering into contract relations not only "with a foreign corporation created for a public "purpose, and carrying on its business within a "foreign jurisdiction, but with the holders of other "bonds of the same series, who were relying "equally with themselves for their ultimate security on a mortgage of the property devoted to a "public use, situated entirely within the territory "of a foreign government.

"A corporation must dwell in the place of its "creation, and cannot migrate to another sovereignty "(*Bank of Agusta v. Earle*, 13 Pet. 588), though " it may do business in all places where its charter "allows and the local laws do not forbid. (*Railroad* "*v. Koontz*, 104 U.S. 12.) But wherever it goes for "business, it carries its charter, as that is the law of "its existence (*Relf v. Rundel*, 103 U. S. 226), and "the charter is the same abroad that it is at home. "Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever "legislative control it is subjected to at home must "be recognized and submitted to by those who deal "with it elsewhere. A corporation of one country "may be excluded from business in another country "(*Paul v. Virginia*, 8 Wall. 168), but, if admitted, "it must, in the absence of legislation equivalent to "making it a corporation of the latter country, be "taken, both by the government and those who "deal with it, as the creature of the law of its own "country, and subject to all the legislative control "and direction that may be properly exercised over "it at the place of its creation. Such being the "law, it follows that every person who deals with a "foreign corporation impliedly subjects himself to "such laws of the foreign government, affecting the "powers and obligations of the corporation with "which he voluntarily contracts, as the known and "established policy of that government authorizes. "To all intents and puposes he submits his contract with the corporation to such a policy of the "foreign government, and whatever is done by that "government in the furtherance of that policy "which binds those in like situation with himself, "who are subjects of the government, in respect to "the effect and operation of their contracts with "the corporation, will necessarily bind him. He is "conclusively presumed to have contracted with a "view to such laws of that government, because the "corporation must of necessity be controlled by "them, and it has no power to contract with a view "to any other laws with which they are not in entire harmony. It follows, therefore, that anything "done at the legal home of the corporation, under "the authority of such laws, which discharges it "from liability there, discharges it everywhere."

If this decision and the above quoted remarks of the court were appropriate to the case of a nonresident bondholder of a corporation, how much more applicable would they seem to be to the case of a stockholder, who is a member and a part of the corporation, while the bondholder is a creditor of, and sustains an adverse relation to, the corporation. And in the case of *Glenn v. Liggett*, 135 U. S. 533, this court, in a suit brought in Missouri, against a stockholder of a Virginia corporation, ruled the following points:—

"The rights of a stockholder must, in a suit "to recover on the call, be adjudicated according "to the requirements of the statutes and juris-"prudence of Virginia, which State created the "corporation, and in reference to whose laws the "contract of the stockholder was made.

"As the suit in the court of Virginia was "properly brought, and it had jurisdiction as to "the subject matter and parties, its adjudication "cannot be reviewed or impeached in the collateral "suit on the call, except for actual fraud."

The decision in this case seems to be very much in point in this case now before the court.

VIII.

The Memphis, Carthage and Northwestern Railroad Company, in which the Seligmans took said stock, was organized, and said stock therein was issued to them, under the general corporation chapter and the chapter on railroad companies of the State of Missouri. Those chapters may be found from Section 2480 to Section 2671 of Vol. 1 of the Revised Statutes of Missouri for 1889, page 625 to page 680. Those chapters were the charter of that company, to which the Seligmans became bound when they came into Missouri, and received their stock in that company under that charter. Section 2517, which is one of the sections of that charter, and is the section authorizing a motion for execution against a stockholder under which we proceeded and obtained the judgment against the Seligmans in this case, was in force as a part of the charter of said Carthage and Memphis Company at the time the Seligmans took their said stock therein. They therefore became bound when they took their stock, by the provisions of that section, to submit to the jurisdiction which that section gave to the courts of Missouri over them as such stockholders.

The charter of a corporation upon well-settled principles is a contract between the State and the members of the corporation, the obligation of which cannot be impaired.

Being a contract, it is mutually binding on both parties, and is just as obligatory in favor of the State and its citizens, who deal with the corporation and become its crditors, as it is in favor of the stockholders. We suppose it will not be denied that the charter of a corporation is just as much a contract with non-resident stockholders as it is with those who actually reside in the same State with the corporation.

Stockholders are just as much subject to the liabilities and the remedies to enforce those liabilities against them, created by the charter of their corporation, as they are to claim the rights, benefits and franchises of such charter. Both the corporation and the stockholders, as members thereof, are subject to all the provisions of the charter as a whole.

The purposes of a corporation are not accomplished when it no longer has property and ceases to do business. But the exercise of jurisdiction in the event of insolvency to enforce the payment of the debts incurred by the corporation, for the benefit of its members while it carried on business, is quite as necessary as control over the corporation before insolvency occurs. Whenever the corporation makes a contract, or contracts a debt, the members and stockholders are all bound, and in theory are present, acting through the corporate agency. But does the stockholder cease to be bound when the time for the enforcement of those contracts, and the payment of those debts, arrives? Does his domicile in the State of the corporation for the purposes of the corporation, and of his membership therein, cease when the payment of dividends is at an end, and the payment of debts begins? Is not the provision of the charter for notice to the stockholder that an execution against him is about to be moved for in the court which has given judgment against the corporation of which he is a member, quite as important as those other provisions of the charter which provide for notices of corporate meetings, or for the consolidation of the corporation, or the sale or lease of its property? If the non-resident does not desire to acquire this status in the State of the corporation, he may decline to do so, by not becoming a member of the corporation. There is nothing compulsory in the matter. But if he voluntarily assumes the relation of stockholder, he must be held to have taken upon himself that status which is inseparable from his membership, as defined and conditioned in the charter.

IX.

The provisions of our general corporation chapter, and of the chapter on railroad companies, which, as we have seen, constitute the charter of the Memphis and Carthage Company, are applicable alike to all the stockholders thereof, resident and non-resident. Neither of those chapters makes any distinction between, or classification of, the stockholders. There is nothing in either chapter, from beginning to end, which distinguishes between resident and non-resident stockholders. Nor is there anything in either chapter which by implication gives any support to the idea that any such distinction exists.

Section 2484 (Rev. Stat. Mo. 1889) provides the manner of convening and holding stockholders' meetings, and contains the requirement that such meetings may be held "by notice served personally on each shareholder in writing, setting forth the place and hour and the object of such meeting." Section 2498 provides that the directors may notify stockholders by notice in writing, served on them personally, to pay up their unpaid stock, and empowers the directors, if the stockholders upon such notices fail to pay up balances due on their stock, to forfeit their stock to the company. Sections 2517 and 2518, being the sections on which the plaintiff proceeded in obtaining the judgment sued on in this case, provide as follows:—

"SECTION 2517. *Execution may issue against "stockholders, when.*—If any execution shall have "been issued against any corporation, and there "cannot be found any property or effects whereon "to levy the same, then such execution may be "issued against any of the stockholders to the ex-"tent of the amount of the unpaid balance of "such stock by him or her owned: *provided "always*, that no execution shall issue against any "stockholder except upon an order of the court in "which the action, suit or other proceedings shall "have been brought or instituted, made upon "motion in open court, after sufficient notice, in "writing, to the person sought to be charged, "and, upon such motion, such court may order "execution to issue accordingly: *and provided "further*, that no stockholder shall be individually "liable in any amount over and above the amount "of stock owned. (R. S. 1879, Sec. 736.)

"SEC. 2518. *Id. Clerk to furnish names, when.* "—The clerk or other officer having charge of the "books of any corporation, on demand of any "officer holding any execution against the same, "shall furnish the officer with the names, places of "residence, so far as to him known, and the "amount of liability of every person liable as "aforesaid. (R. S. 1879, Sec. 737.)"

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Section 2567 authorizes the consolidation of a railway company with another company upon a majority vote of the stockholders of each company at a meeting called for the purpose on sixty days' notice of the time, place and purpose of said meeting. And Section 2568 authorizes the sale or lease of a railroad upon a like vote of the majority of the stockholders at a meeting held on the same sixty days' notice.

As before stated, these provisions make no distinction between resident and non-resident stock-holders, and we submit that any of the foregoing notices would have the same effect if served on stockholders living in Boston, New York, Philadelphia or Chicago, as if served on stockholders in St. Louis, St. Joseph or Kansas City. Section 2503 provides that every corporation shall keep a transfer-book, which shall contain all stock transfers, and also another book, containing the names of its stockholders. And thus is amply provided, in the charge and keeping of the company, the information on which any of the foregoing notices may at any time be given. There is nothing in any of the provisions of either the general corporation or railroad company statutes that warrants an interpretation restricting their operation to resident members. It will not be denied that the statutes which bind non-resident stockholders by the service of notice of corporate meetings at which their property may be practically destroyed by consolidation, sale or lease of the corporation and its property, or at which their entire stock may be forfeited for non-payment of a single installment, are alike applicable to all the stockholders, resident and non-resident. But if these statutes be applicable to the foreign members of the corporation, what reason is there in saying that the above cited statute, providing for the issue of an execution against a stockholder on a like notice to him, only applies to resident members? If the courts assume the exercise of the legislative function, where will they begin, and where will they end? The statute authorizing the award of an execution against a stockholder is, as we save seen, a valid and constitutional enactment, considered according to its express terms, as providing that: "Execution may be issued against *any of the stockholders* to the extent of the amount of the unpaid balance of such stock by him or her owned."

Is there any reason of public policy why this plain provision of the law should be so construed and enforced by the courts as, contrary to its expressed terms, not to apply to all of the stockholders? Ever since the statute giving this remedy by motion for an execution against a stockholder was first enacted in the State of Missouri, over nine-tenths of the stock in railroad and telegraph companies in that State has been held by non-residents. If, therefore, that statute be only available against resident stockholders, it only applies to a very few, and fails to accomplish the high and remedial purpose which we must suppose the legislature designed to accomplish by its enactment. The proceeding for an execution against a stockholder, being statutory in its origin, cannot be pursued elsewhere than in the courts of Missouri. It cannot be enforced in the courts of other States. In answer to all this, it may be said that our corporation laws are not applicable to non-resident stockholders, because those who might chance to live out of the State are not particularly described in those laws as non-resident stockholders. But, as we have seen, the statutes relating to notices of corporate meetings, consolidations, leases and sales, the forfeiture of the entire stock for failure to pay single installments, are confessedly applicable to non-resident stockholders. And if, notwithstanding the failure of the legislature to distinguish by the use of any language to that effect in any part of our corporation laws between the two classes of stockholders, a portion of those laws are nevertheless applicable to both classes, is there any reason for holding that the other portion of the laws should not be given like effect? The truth is, no classification of the stockholders, either as to residence or in other respects, was in the mind of the legislators or of the people when the provisions in our constitution and laws were adopted for the government of our corporations and their members in this State.

Silence on these points in our constitution and laws exists, because, as we suppose, such a distinction as is now sought to be made by judicial construction was never dreamed of by any of the many makers of our numerous corporation laws in our different constitutions and statutes.

And if the people making our different constitutions, and the various legislatures in the enactment of the many laws for the government of our corporations and their stockholders, have made no distinction or classification, none should be made in their enforcement by the courts. The courts are not at liberty to engraft exceptions on the laws, except so far as those exceptions have been made by the law-maker.

We think that Section 2498, and Section 2517 under which we proceeded in this case, should be construed as parts of one entire system. By the former section, the directory, while the corporation is engaged in active business, may make calls on the stockholders for their unpaid stock to the extent of its full amount as the business and exigencies of the corporation, in the judgment and discretion of the directors, may require. (See the case of *Mills v. Stewart*, 41 N. Y. 384.) This power is given by the corporation laws of most of the States. After the corporation has ceased to do business, becomes insolvent, and thus, like this corporation, becomes defunct, then Section 2517 provides that the courts which render judgments against the corporation for its unpaid debts may, upon the return *nulla bona* of executions against it, make calls on the stockholders for so much of their unpaid stock as becomes necessary to pay these judgments, by issuing therefor executions against them.

Surely a court of general common law jurisdiction, like the Circuit Court of the City of St. Louis, proceeding on this motion, as in all cases, according to well-established legal usage, is quite as competent to exercise this power as a board of directors, who are generally not versed in those rules of judicial procedure designed for the security of the citizen, or his property, and who make their calls on the stockholder for their unpaid stock arbitrarily and without opportunity to be heard by the party charged. The court, in making the call and issuing therefor the execution against the stockholder, is exercising the same jurisdiction which belongs to a court of chancery in winding up the affairs of insolvent corporations (see *Erskine v*

Lowenstein, 82 Mo. 301), and which was so frequently brought into use during the life of the recent Bankrupt Law by summary calls made by the Court in Bankruptcy on stockholders, resident and non-resident, of corporations which had been adjudged bankrupt therein. Similar to this is the power given to the Comptroller of the Currency in the National Banking Act to make assessments, having the force of judgments, against the stockholders of an insolvent national bank.

In order to enable the court, in a case like this, to make the call on the stockholder and issue the execution against him without delay and with dispatch, Section 2518 of our Corporation Law, which, with the preceding Section 2517, regulate the remedy we here pursue, provides that, "the clerk or other officer having charge of the books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officers with the names, places of residence, so far as to him known, and the amount of liability of every person liable as aforesaid."

This remedy initiated on the information thus easily obtained, and always attainable from the stock-books of the corporation, was designed by the legislature to be efficient in all cases, simple in its character and operation, and inexpensive to the parties. The fact that the person proceeded against is a stockholder is, as in this case, usually evidenced in conformity with our laws, by the stock and transfer books of the corporation, and the only remaining inquiry, whether he owes for unpaid stock, and if so, how much, presents a question which may may be easily and speedily ascertained by the court.

The fact that the stockholder, when notified of the motion for execution against him, takes issue with the stock and transfer books which evidence his membership in the corporation, does not take from the proceeding its summary character. The remedy against the stockholder is indeed summary, but the fact that it is summary constitutes its chief recommendation.

The method of notifying the stockholder of this proceeding is also simple and summary. The section which gives the remedy provides that the order for execution against the stockholder shall issue "after sufficient notice in writing to the person sought to be charged."

The objection that the remedy is a summary one in which the right of a trial by jury is denied, would be just as valid if urged by a resident stockholder as when made by a non-resident. As the jurisdiction to wind up corporations, assess stockholders, and apportion among them the debts of the corporation, was originally equitable in its character, it was competent for the legislature to give this remedy by trial, summarily, on motion before the court. (*In the matter of the Empire State Bank*, 18 N. Y. 200.)

X.

It would have been competent for the Missouri Legislature to have passed a winding-up act, conferring jurisdiction on the courts of that State over all insolvent Missouri incorporations and the stockholders therein, on notices served on them. This view is illustrated by the case of the *Empire City Bank*, 18th N. Y. 199, decided by the Court of Appeals of New York.

That was a proceeding under the laws of that State for the administration of the estates and property of certain insolvent banks, and authorized the referee of the court, having jurisdiction over the corporation, to take a full account of the debts of the corporation; and in case of deficiency of assets, power was given to notify the stockholders by personal service as to the stockholders who lived in the county where the bank was located, and by advertisement in some paper as to all stockholders who were non-residents, and upon the giving and return of such notice, to adjudge against each stockholder the payment of amount of his apportionate share of the debts, based upon the stockholder's liability as fixed by the constitution and laws of the State.

The court held that the proceeding under this law before the referee, and on appeal from his report, where all parties interested have a right to be heard, though summary, is due process of law, within the meaning of the constitution, and that the stockholders were bound by the adjudications of the referee against them on the foregoing notices.

If the Legislature of New York, as decided by her Court of Appeals in the case cited, could pass a law giving her courts jurisdiction to wind up the affairs of any of her insolvent corporations, by first appropriating the tangible property of the corporation to the payment of its debts, and then providing for the deficiency by assessments, having the force of judgments, against stockholders, resident and non-resident, and given personally as to residents, surely there can be no question about the power of the Legislature of Missouri to pass the law under which we proceeded in this case. Our law authorizing an execution against a stockholder only applies to insolvent corporations without property or means to pay their debts, and to the extent that it secures payment to the particular judgment creditor who pursues this remedy, it is in its operation and effect not unlike the operation of the winding-up acts of the older States, which they have passed for the dissolution of their insolvent corporations, and for the payment of their debts out of the corporate assets and the property of their stockholders.

Both the defendant corporation and the stock therein were created by our laws, and both the corporation and the stock continue subject to the rightful control which the legislature and local tribunals of this State may at any time exercise, provided no injury is done to the contract rights of the Seligmans as stockholders under their charter of incorporation. So far as the proper or necessary control of the defendant corporation and its members involves the exercise of judicial as distinguished from legislative power, exercise of jurisdiction by the local courts becomes requisite as well as lawful.

XI.

Such jurisdiction, whether conferred by a winding-up statute, or by a statute such as the one under review in this case, authorizing judgments against stockholders, resident and non-resident, on notices served on them, rests on the consent which the stockholder gives to submit to such jurisdiction by taking his stock under a charter creating that jurisdiction over him.

By coming into this State and becoming a member, and assisting in the creation or continuation of a body which our law, at his instance and on his behalf, and for his benefit and profit, endows with the power and capacity to make contracts, obtain credit, and sue and be sued, he necessarily consents that he will submit to the control of our laws, and agrees that he will be bound by all judicial determinations against the corporation of which he voluntarily becomes a member. He cannot come into this State and enjoy the franchises and special privileges which our laws give him, in common with our citizens, without consenting to become subject to the terms and liabilities which those laws impose upon all stockholders alike, as conditions to the enjoyment of those franchises and privileges.

In the case of *Randolph v. Kieler*, 21 Mo. 557, a judgment was affirmed in a suit on a judgment rendered in New Jersey founded on a warrant of attorney executed by the defendant in Pennsylvania, empowering "any attorney of any court of record in the United States to confess judgment against him." In that case the defendant, by giving the warrant of attorney, consented to the rendition of a judgment against him in any court of record in the United States. In this case the stockholder consented, when he took his stock, to become subject to the jurisdiction of any court in which a judgment might be rendered and an execution *nulla bona* returned against the corporation in which he took his stock. In the one case the party consents absolutely to a judgment, and in the other he consents to a proceeding by motion and personal notice against him, in which, before a judgment can be rendered against him, hs has the right to be heard. The jurisdiction now so commonly exercised in the different States over foreign corporations, rests upon the same principle of consent, by the non-resident corporation, on coming into a State, to submit to its jurisdiction. It would therefore seem entirely clear that stockholders, resident and non-resident, of a corporation, all agree, when they become its members, to submit to the jurisdiction which the local law in force at the time provides may be taken, either over the corporation or over them, as its members. It follows that when in 1872 the Seligmans became members of the Memphis and Carthage Railroad Company, and acquired their stock therein, they agreed to become bound by every judgment which should be rendered against their company, in the State of Missouri, and also by every proceeding thereon by notice and motion for execution against them as such stockholders.

XII.

Under our American system of creating corporations, the capital stock thereof is open to purchase by the citizens of all the States, and the laws of Missouri authorize non-residents, as well as residents, to form and manage Missouri corporations.

While the Congress of the United States has power to regulate inter-state commerce, it has no power over State corporations or the stockholders therein. The corporations in the various States are rapidly multiplying, and the doctrine we contend for becomes a necessity in order to enable the local authorities and tribunals of the several States, who alone have power and jurisdiction over these corporations and their members, to protect the property rights of the stockholders of the corporation on the one hand, and on the other hand to enforce as against the corporation and its members the claims and demands of creditors and other parties with whom the stockholders contract through the agency of their corporate body.

XIII.

We have thus far considered the question from the standpoint of reason and principle. Let us now examine the authorities applicable to the case.

The case of *Vallee v. Dumergue*, 4th Exchequer Reports, p. 289, is in point on this question. That was an action in 1849 in an English court against an Englishman on a French judgment, and the defendant pleaded that he was not, during the accruing of the cause of action, or any part of the proceedings, nor from thence hitherto, resident in France, or within the jurisdiction of the court, nor subject to the laws of France; that he was never served with any process or notice whatever; nor had he any notice whatever of any proceedings in the action; nor did he appear in court, or have any opportunity of defending himself against the claim, and the proceedings were taken in his absence and without his knowledge, privity and consent. To this plea there was a replication that the defendant became a shareholder in a certain company in France, subject to all the rights and liabilities attaching thereto; that the defendant was resident in England, and by reason thereof it became necessary by the law of France for the defendant to elect a domicile in France, at which the directors of the company might notify to him all the proceedings relative to the company, or the defendant as such shareholder; that by the law of France all legal proceedings affecting any party having his real domicile out of that kingdom left for him at such elected domicile were as valid as if left at his real domicile in France; that the defendant made election of domicile at a place in Paris, and gave notice thereof to plaintiffs; that the assets of the company being insufficient to discharge their debts, the defendant as a shareholder was by the law of France liable to pay a certain sum, and to be sued for the same by the plaintiffs; that the plaintiffs, for the recovery thereof, caused a summons to be left at his elected domicile, requiring him to appear in court at a certain time and place; that the defendant did not appear according to the exigency of the summons, wherepon the plaintiffs recovered judgment by default. On special demurrer to the replication, *held*, that the facts stated in the replication afforded an answer to the plea. The principle of that case is identical with the case at bar.

In that case the law of France provided that as to all non-resident stockholders they should be bound by constructive service in France of the notice or process. The effect of our law is to bind the non-resident stockholder with personal service of notice wherever found. As the jurisdiction by the tribunal sitting within the domicile of the corporation over the non-resident stockholder is acquired over his person while he is a resident and citizen of another country or State, and as he, in the case cited, was held bound by constructive service at the place of holding the court, the result must be the same where, as in the case of our laws, he is served with *actual* notice where he resides. The principle underlying each system, resting as it does on the consent of the non-resident, is the same in both cases. The only important distinction between the two cases consists in the difference between the modes of service to which the parties respectively consent to submit when they acquire membership in the two corporations. If, in the case cited, the Englishman was bound personally, as was decided, by the service of constructive notice in France, of which he had no actual notice whatever, he certainly would have been bound if, pursuant to the law of France in force at the time of the creation of his membership, he had been served personally with actual notice at the place of his real domicile in England. Indeed, personal service is always more favored by the courts than constructive service. (*Bronson v. Keokuk*, 2 Dill. 498.)

Another difference between the case cited and the one at the bar is, that in the former no suit was brought against the corporation, but the English stockholder was sued in and the original process ran against him direct from the French court. Under our laws, the suit in the first instance is against the corporation, affecting thereby all its members, and the proceeding against the stockholder is supplemental thereto.

There is another difference between the two cases, consisting in the fact that the relation of the separate States in the American Union, and of their citizens and corporations, is much more intimate than between England and France and their citizens. There is another English case, decided in 1874, which is also precisely in point. We refer to the case of *Copin v. Adamson*, Law Reports 9th Exchequer, 345; s. c. 10 Moak, 492. That case was as follows:—

"To an action on a French judgment, the de- "fendant pleaded that he was not at any time be- "fore judgment resident or domiciled in France, or "within the jurisdiction of the court, or subject to "French law; that he was never served with any "process; nor had any notice or opportunity of de- "fending himself."

"Replication.—That defendant was holder "of shares in a French company, having its legal "domicile at Paris, and became thereby subject "by the law of France to all liabilities, etc., "belonging to holders of shares, and, in particular, "to the conditions contained in the statutes or "articles of association; that by these statutes it "was provided and agreed that all disputes arising "during liquidation between shareholders should "be submitted to the jurisdiction of the French "court; that every shareholder provoking a con- "test must elect a domicile, and in default, election "might be made for him at the office of the Im- "perial Procurator of the civil tribunal of the de-

"partment in which the office of the company was "situated; and that all summons, etc., should be "validly served at the domicile formally or impli-"edly chosen; that the company became bankrupt, "and defendant's unpaid calls became payable to "the plaintiff, as assignee; that he made default and "provoked a contest; that he never elected a domi-"cile, and thereupon the plaintiff caused summonses, "etc., to be served at the office aforesaid; that by "the law of France that office was the defendant's "implied domicile of election for the purpose of "service, and that the service was regular; and that "the defendant was bound to appear, but did not, "whereupon judgment by default was recovered "against him. On demurrer: *Held*, that that rep-"lication was good."

In deciding the case, KELLY, C. B., used the following language:—

* * * * * * *

"I apprehend that it is now established by "the law of this country that one who be-"comes a shareholder in a foreign country, and "therefore and thereby a member of that company "—such company existing in a foreign country, and "subject in all things to the laws of that country— "himself becomes subject to the laws of that country, "and to the articles or constitutions of that com-"pany construed and interpreted according to the "law of that country, in all things and as to all "matters and all questions existing or arising in "relation to or connected with the acts and affairs "and the rights and liabilities of such company and "its members severally and collectively; and if that "company, by the law of the country in which it "exists, or by the articles of its constitution, is "subject to the jurisdiction of a particular court "within that country, so also is each shareholder or "member subject to its jurisdiction in all cases in "relation to or connected with such company."

* * * * * * *

"I have stated already what I consider to be "the law governing such cases, and I now proceed "to advert to some of the other authorities which "are cited on the argument.

"The first case to which it is necessary to re-"fer is the *Bank of Australasia v. Harding*, of "which the marginal note is as follows: 'The "members resident in England of a company "formed for the purpose of carrying on business "in a place out of England, are bound in respect "of the transactions of that company by the law "of the country in which the business is carried "on.' This proposition of law is really decisive of "the present case, and it is fully borne out by the "facts, which deserve to be examined somewhat in "detail. The defendant, Harding, it appeared was "sued on a judgment obtained against him in Aus-"tralia, where a company was established, of "which he had become a member. He was not "resident in the Colony nor subject to its laws, un-"less by becoming a shareholder he became so. "The company was itself established by a colonial "statute, 'which may be assumed,' says Wilde, C. "J. (at page 685), "to have been obtained at the "request of the parties. It provided that one "member holding a principal office in the company might sue or be sued instead of the whole "body, and that execution might issue against the "other members. But while giving this benefit to "the company, the act provides that the rights "and liabilities of the parties should not "be varied. Now, independently of the Colonial Act, the defendant would have been "liable in respect of the demand for "which the defendant is now sued; and if the "judgment had been recovered in an action brought "against all the members jointly, an action of debt "or *assumpsit* would clearly have lain against the "defendant upon that judgment.' Granting, there-"fore, that in an action against all the members the "defendant would have been responsible, the ques "tion arose whether he was responsible in an action "on a judgment obtained in the Colony against the "chairman or principal officer, who, under the Colonial Act, was liable, instead of all the members.

"The defendant set up the same defense as is "relied on here, that he was not resident in the Colony, and had no notice or knowledge of the pro-"ceedings. But the answer was, that by becoming "a member of the company, which existed only in "the Colony, and by virtue of its laws, he had, in "all matters relating to the company, himself be-"come bound by the colonial law, and subject to "the jurisdiction of the colonial courts.

" 'I am of opinion,' says CRESSWELL, J. (at "page 687), 'that the plaintiffs are entitled to judg-

"ment. From the pleadings it appears that the "defendant was a member of a company who must "be taken to have been a consenting party to the "passing of the Colonial Act. He must, therefore, "be regarded as having agreed that suits upon con- "tracts entered into by the company might be "brought against the chairman, and that the chair- "man should for all purposes represent him in such "actions. Being his own appointed agent, he had no- "tice of the proceedings. If he had been resident in "the Colony, he could not have made himself a party "to the action, or in any way personally interfered "in the proceedings.' Now, how had the chairman "been appointed his agent? Simply by virtue of "the defendant having become a member of the "company, and therefore, service of process on the "chairman, who, by law of the Colony, was liable to "be sued, was held a service upon the defendant, "although he was not resident or domiciled in the "Colony, and had never himself heard of the pro- "ceedings. The answer to the defendant's plea, "that he was non-resident and had no notice, 'is,' "says TALFOURD, J., in his judgment (at page 688), " 'that the defendant was a member of a partner- "ship carrying on business in the Colonies, and "was contented to leave his property there to "be regulated by the law of the Colony.' It cer- "tainly seems to me impossible to have any author- "ity more directly in point, and the *Bank of Aus- "tralasia v. Nias*, 16 Q. B. 717, is to the same "effect."

* * * * * * * * *

"Upon all these authorities, therefore, it appears to me that the defendant is liable, and the "principles they establish are, in my opinion, rea-"sonable and just. The defendant, as a share-"holder in this foreign company, becomes entitled "to all the benefits resulting from the possession of "the shares: surely it is very reasonable that the "law of France, and, as it is alleged in the first rep-"lication here, the articles of the association also, "should provide that he should elect a domicile, "and that if he does not, one may be elected for "him, at which process, if necessary, may be "served. Otherwise it might be that a shareholder "might for years receive all the benefits belonging "to his position and yet escape all the burthens, "just because his real domicile was out of the king-"dom of France, or there were not means of discov-"ering where he might be and enforcing a demand "upon him."

The above case of *Copin v. Adamson* was affirmed on appeal and the report of the case in the appellate court may be found in the 45th Law Journal, common law, page 15; and also in the 1st Law Rep., page 19. And these two English cases of *Vallee v. Dumergue*, 4th Exchequer Reports, page 289, and *Copin v. Adamson*, Law Reports, 9th Exchequer, page 345, so directly in point in this case, have received the approval of this court, in the case of *Pennoyer v. Neff*, 5 Otto, page 735. In that case Mr. Justice Field, who delivered the opinion of the court, in speaking of the exceptions to the general rule that jurisdiction cannot be taken over a non-resident, uses the following language:—

"Neither do we mean to assert that a State may not require a non-resident, entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contract, or to designate a place where such service may be made and notice given, and provided, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgment rendered upon such service may not be binding upon the non-residents, both within and without the State. As was said by the Court of Exchequer in *Vallee v. Dumergue*, 4th Exch. 290: 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.' (See also *The Lafayette Ins. Co. v. French et al.*, 18 How. 404, and *Gillespie v. Com. Mut. Marine Ins. Co.*, 12 Gray (Mass.) 201.

"Nor do we doubt that a State, on creating "corporations or other institutions for pecuniary "or charitable purposes, may provide a mode in "which their conduct may be investigated, their "obligations enforced, or their charters revoked, "which shall require other than personal service "upon their offiers or members. Parties becoming "members of such corporations and institutions "would hold their interest subject to the conditions "prescribed by law. (See *Copin v. Adamson*, "Law Rep., 9 Ex. 345.)"

XIV.

If it be contended that the order dated September 5, 1887 (page 86, Printed Record), of the St. Louis Circuit Court, should be construed as setting aside the judgment sued on in this action dated December 3, 1883 (page 76, Printed Record), then such order is without effect for the reason that both that order and the motion to quash an *alias* execution on which that order was founded were steps in the court at the June term, 1887, thereof, which was more than three years after the rendition of the judgment of December 3, 1883, which was given at the December term, 1883, of that court. A judgment cannot be set aside after the lapse of three years from its rendition.

Downing v. Still, 43 Mo. 309.
Richardson v. Richardson, 49 Mo. 29.
Bronson v. Schulten, 104 U. S. 410–415.

XV.

We submit that the judgment of the court below should be reversed and the cause remanded with directions to the court below to give judgment for the plaintiff against defendant for the sum of $69,443.00, with interest and costs.

Respectfully submitted.

JAMES S. BOTSFORD,
M. T. C. WILLIAMS,
For Plaintiff in Error.

Office Supreme Court, U. S.
FILED,
JAN 15 1892
JAMES H. McKENNEY,
[illegible]

IN THE
SUPREME COURT
OF THE
UNITED STATES,

OCTOBER TERM, 1891.

WILLIAM C. WILSON, Plaintiff in Error,
VS.
JESSE SELIGMAN, Defendant in Error.
NO. 177.

STATEMENT OF CASE, POINTS AND BRIEF FOR DEFENDANT IN ERROR.

JAMES O. BROADHEAD,
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SPRINGFIELD, MO.

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WILLIAM C. WILSON, Plaintiff in Error,
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STATEMENT OF CASE, POINTS AND BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

On the 2nd day of April, 1883, in the Circuit Court, city of St. Louis, Missouri, judgment was rendered in favor of plaintiff in error, in a case therein pending, wherein the said William C. Wilson was plaintiff, and the Memphis, Carthage & Northwestern Railway Company, a corporation organized under the laws of the State of Missouri, was defendant, for the sum of $72,799.38, upon which judgment, execution was issued against the defendant Railway Company and returned unsatisfied; thereafter, on the 9th day of July, 1883, plaintiff in error filed in the Circuit Court in the city of St. Louis, a motion for an order directing the issuing of an execution against the firm of J. & W. Seligman & Co., alleging that the firm was composed of James Seligman, Jesse Seligman and Joseph Seligman; that in 1880, Joseph Seligman departed this life; and that the firm was the owner and holder of a certificate of capital stock in the said Memphis, Carthage & Northwestern R. R. Co. of the par value of $6,000,000; that said stock was issued in the name of said firm in 1872, and that there was yet due on said stock from said firm to the said Memphis, Carthage & Northwestern Railway Company, the sum of $5,000,000, and prayed the Court to render judgment that execution issue against said James Seligman, Jesse Seligman and Charles W. Rogers, who was administrator of said Joseph Seligman, deceased, for the sum of $72,799.38, with interest and costs.

The defendants being non-residents and not found within the state of Missouri, service of process or notice in this suit, was had upon James Seligman and Jesse Seligman on the 2nd day of July, 1883, at their domicile in the state of New York, by delivering to each of them a written notice that on the 1st day of October, 1883, plaintiff would move the Circuit Court of the city of St. Louis for judgment and execution against the defendant Seligmans for said sum of $72,799.38, being the amount of the judgment which plaintiff obtained against the Memphis, Carthage & Northwestern R. R. Co. Plaintiff in error, also on the 9th day of July, 1883, posted in the office of the clerk of the (state) Court in St. Louis, a notice similar to that served on James and Jesse Seligman in New York, and delivered a copy of the notice to James O. Broadhead, who had appeared in other cases as attorney for the Seligmans; the Seligmans not appearing in the case, the Court, on the 3rd day of December, 1883, rendered a judgment in favor of plaintiff in error and against the Seligmans; finding that the said firm of which J. & W. Seligman & Co. was a stockholder in the Memphis, Carthage & Northwestern R. R. Co. and held 60,000 shares of the stock of said company, of the par value of $100 each, and that there remained unpaid upon said stock, the sum of $5,000,000; that there was due from the said Memphis, Carthage & Northwestern Railway Company, to plaintiff in error, the sum of $75,838, and ordered and adjudged that the motion be sustained and that a general execution be issued in favor of plaintiff in error, and against Jesse and James Seligman, for the sum last mentioned and costs of the proceedings.

Subsequently, and on the —— day of————1888, plaintiff in error instituted a suit on this judgement, thus obtained, against the Seilgmans in the (State) Circuit Court in the city of St. Louis, service of process was had upon Jesse Seligman within the State of Missouri,he being temporarily in the state on business.

At the return term of the writ of summons, the defendant in error, filed his application in the State Court to remove the case to the United States Court for the Eastern District of Missouri, on the ground that he was a non-resident of Missouri and a citizen of, and domiciled in the State of New York. On this application the case was transferred to the United States Circuit Court for the Eastern Disrrict of Missouri. After this action was brought on the judgement, the defendant in error, appeared in the State Court, and filed a motion to set aside the judgement sued on in this case, for the reason that he had not been served with process in the case, and the State Court had not acquired jurisdiction of him to render the judgement. To this motion the plaintiff in error, appeared, the Court sustained the motion and set aside the judgement, and from which decree of the Court setting aside and annulling the judgement, no appeal has been taken. At the ——— term 1888, of the United States Circuit Court for the Eastern District of Missouri, Seligman filed an answer to plaintiff in error's petition.

Denying First, that plaintiff was a stockholder in the Memphis, Carthage & Northwestern Railroad Company.

Second, Averring that the pretended judgement rendered in favor of plaintiff in error. and against the Seligmans, in the State Court, was void for the reason that process had not been served upon the defendant in the case; and that the Seligmans at no time resided in, or were citizens of the State of Missouri, but were at the time of the institution of the suit, domiciled in, and citizens of the State of New York; and that the Circuit Court of the city of St. Louis, when it rendered the judgement sued on, had not acquired jurisdiction of the defendant in error.

And Third, That since the institution of this suit, the Circuit Court of the city of St. Louis. in which the judgement sued on, was rendered, had by proper order and decree, annulled, vacated and set aside the same, and which last mentioned judgement of the said Circuit Court of the city of St. Louis, remained unimpaired, and was in full force and effect.

On trial of the case in the United States Circuit Court before Justice Brewer, judgement was rendered in faver of the defendant Seligman; the Court holding that the proceedings instituted by plaintiff in error against the Seligmans in the (State) Circuit Court, and upon which judgement was rendered, was void, and that the notice served upon the Seligmans in New York, and posted in the Clerk of the Circuit Court's office in St. Louis, did not confer jurisdiction on the State Court to render the judgement against defendant in error. The judgement of the United States Court being adverse to plaintiff, he brought the case to this Court, by Writ of Error.

POINTS.

The only questions now presented for the consideration of this Court, are:

First, had the State Court acquired jurisdiction over the defendant, a citizen of the state of New York and domiciled therein, when it rendered the judgement against him sued on in this case. He was not served with process within the state of Missouri, and did not appear to the action; and the only notice of the pendency of the proceedings which he had, was by plaintiff posting a written notice in the office of the clerk of the State Court in city of St. Louis, and delivering to defendant at his domicile in the state of New York, a copy of such notice and of the petition in the case.

The effect of the proceeding had against Seligman, if sustained, is to subject a non resident to a personal judgement, notwithstanding, he was not served with process within the state, and was only notified of the pendency of the action by process going out of the Courts of the state of Missouri into the territorial jurisdiction of the state of New York, and being there served upon a citizen of the last named state, at his domicile therein.

Second, was the pretended judgement sued in this case set aside and annulled by the State Court in which it was obtained, before the trial of this case in the United States Circuit Court? If so, notwithstanding, the State Court in the original proceedings may have acquired jurisdiction of the Seligmans by the notice served on them in the state of New York, yet the State Court which rendered the judgement, having annulled and vacated the same an action could not be maintained thereon against defendant in error, and for this reason alone, if no other, judgement was properly rendered for the defendant in the United States Circuit Court.

Third, did the statutes of the state of Missouri attempt to authorize the service of process beyond the boundary of the state in proceedings in which a personal judgement alone could be rendered. On the part of the defendant in error, it is insisted that there was no statute of the state of Missouri authorizing service beyond the territorial jurisdiction of the state, in a case like the one at bar, and that if there was, such statute was void.

BRIEF.

I.

In proceedings *in personam* it is not within the power of a State to authorize the service of process or notice beyond its territorial jurisdiction; and process or notice beyond the boundary of the State will not give the court jurisdiction over a non-resident defendant.

One State has no authority to invade the jurisdiction of another, and by service of process or notice, compel parties there resident and domiciled to submit their controversies to the determination of its courts.

Cooley Constitutional Limitations, pp. 463-404 and authorities cited in note at bottom of those pp.

Pana vs. Bowler, 107 U. S. 529.
Pana vs. Bowler, 12 A. E. R. Cases, 576.
Pa. Co. vs. Sloan, 1 Ill. App. 364.
47 Maryland, 203.
Bimeler vs. Dawson et al., 4 Scammon, 542.
Sim vs. Frank, 25 Ill., 109 (original ed. p. 125.)

The person upon whom the court acts must be within the territorial jurisdiction of the court, or the judgement will be void.

Galpin vs. Page, 18 Wallace, 350-367.
Freeman on Judgements, 127.

The code of all enlightened nations recognizes the jurisdiction to be rightfully exercised, must be founded on the presence within the territory of the person or thing in respect to which jurisdiction is exerted.

Story on Conflict of Laws, sects. 546-592.
Gibbs vs. Insurance Co., 63 N. Y. 114.
Street vs. Smith, 7 W. & S. (Pa.) 444.
Beard vs. Beard, 21 Ind. 328-332.
Sturgis vs. Fay, 16 Ind. 429.
Cooley Constitutional Limitations, 497 (402).

In a government like ours where there are several States, and each possesses an extensive, as well as an exclusive jurisdiction within its own limits, it may be laid down as a general rule, that its jurisdiction does not pass beyond its territorial limits, and that within its limits its jurisdiction is exclusive.

1 Wait's actions and Defenses, 47-50.
2 Waits Actions and Defenses, 11 and 15.
Fathian vs. Monks, 43 Mo. 502.
Latmier vs. U. P. R. R. Co., 43 Mo. 105.
14 Howard, 174, 334-339.

To render the jurisdiction of a court effectual it is necessary that the thing in controversy, or the parties, be subject to the process of the court within the state.

Goetchens vs. Mathewson, 61 N. Y. 420;
Underwood vs. McVeigh, 23 Gratt. 469;
McVeigh vs. U. S., 11 Wall. 259.
Block vs. Block, 4 Bradf., Sur. Rep. 174.
Sim vs. Frank, 25 Ill. 109.
Hughes vs. Hughes, 4 Waite, 164.
Baker vs. Tyrite, 2 Rd. & E. 897.
Smith vs. McCutcheon, 38 Mo. 415.

A statute is nugatory which attempts to authorize a judgement against a party not reached by process within the state.

Waples on attachment, 339.

Process cannot be served upon a party beyond the territorial jurisdiction of the court.

Kendle vs. U. S., 12 Peters, 527, 623.

Boswell vs. Otis, 9 Howard, 336.

No authority to issue process to another states.

Herndon vs. Ridgway, 17 Howard, 425.

On question of jurisdiction and construction of statutes see—

Potter's Dwarris pp. 361 and 480.

What is due process of law.

Potter's Dwarris, 479, 485, 486.

Ditson vs. Ditson, 4 Rhode Island Rep. 87.

The stockholder must be within the jurisdiction of the court.

Thompson's Liability of Stockholders, section 357 and 359.

Process or notice served beyond the territorial boundary of a state on a citizen of another state does not confer jurisdiction, and a judgment rendered on such service is void in state where rendered.

Pennoyer vs. Neff, 95 U. S. 714.

Baylis vs. C. & C. R. R. Co., 19 Iowa, 206.

Emery vs. Legro, 63 Main, 357.

Ross vs. Buchannan et al., 13 Ill 55.

A judgment in personam, without service within the territorial jurisdiction of the court rendering it, is void.

Wiley vs. Pavey, 61 Ind. 457.

Joyce vs. Whitney, 57 Ind. 550, 557.

Personal service of notice, in order to give the court of one state jurisdiction of a defendant who resides in another, must be had within the jurisdiction of the first state.

Ewer vs. Coffin, 1 Cush. 23.

Peabody vs. Hamilton, 106 Mass. 217.

A judgement against one partner is not binding on another partner, a citizen of another state, although by the laws of Connecticut, where the firm was in business and judgment rendered, service on one authorizes judgment againt all.

Phelps vs. Brewer, 9 Cush. 390.

Gillespie vs. Ins. Co., 12 Gray 201.

Cooley's Constitutional Limitations, 403-404 (edition 1868).

D'Arcy vs. Ketchum, 11 How. 165.

In Sturgis vs. Fay, 16 Indiana, 429, the Supreme Court of Indiana held that the jurisdiction of a State extends over all person and property within her borders, and that she may subject both the one and the other to her judicial power; but she cannot thus subject either person or property not within the jurirction. At p. 413 the Court says:

"The state exercises her jurisdiction over property by seizing it through the officers of her courts. * * * She exercises her jurisdiction over persons, by bringing them before her courts through the action of the officers of these courts, or by notifying them to appear. This notice she has not the absolute power to give, except within her own boundaries; and, in point of law, has no right to assume to give it beyond those limits as a ground of claiming the right of exercising jurisdiction. But to residents, or persons actually within her jurisdictional limits, she has a right to give such notice by the officers of her courts, and those courts may acquire a right to exercise jurisdiction over such persons by rendering personal judgment against them. * * * If the defendant has become a non-resident service cannot be made."

In Welsh vs. Sykes, 3 Gillman, Ill., R. 197, at p. 201, the court says:—

"It is competent for each state to prescribe the mode of bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are, nevertheless, binding on its citizens."

In Beard et al. vs. Beard, supra, Supreme Court of Indiana, says (p. 323) :—

"The question, then, is one of power on the part of the legislature to authorize such a judgment.

In governments where the legislature, as in case of the British Parliament, is possessed of the supreme power of the state, it can hardly be doubted that it would be competent for such legislatures to authorize personal judgments upon constructive notice. Such judgments would not be held void as against natural rights. * * *

Again at p. 327, the court says:—

"But, notwithstanding a state may authorize its courts to render a personal judgment, upon constructive notice against its citizens, *It cannot as we think, authorize such a judgment, upon such notice, against a citizen of another state*, resident in such other state, unless such citizen submits himself to the jurisdiction of the courts in which the action against him is instituted, by voluntarily appearing in person or by agent. * * * The practice which prevails in some countries, of proceeding against absent parties, by means of some formal notice, like that of *viis et modis* of the Roman civil law, without actual personal notice of the suit, connot be reconciled with the principles of international justice."

Wheaton (Int. Law, p. 288) says :

The judicial power of every State may be extended to all controversies respecting personal rights and contracts, or injuries to the person or property. *when the party resides within the territory*, wherever the cause of action may have originated.

But the State cannot give its laws or jurisdiction an extra-territorial operation upon citizens or property of another State. * * * * The authority of every judicial tribunal, and the obligation to obey it, are circumscribed by the limits of the territory in which it is established.

The case last cited was a divorce suit, and judgment was rendered for costs and alimony. The Supreme Court held that in so far as it was a money judgment it was void.

In England proceedings in personam are authorized, by publication against non-residents, but in Beard vs. Beard, 21 Ind. 326, the Court says :

" These are judgments obtained, as we take it, against resident citizens of the State, who may be temporarily concealed or absent, so that the actual notice cannot be given to them. Story in his Conflict of Laws shows this (sect. 557 et seq). In England the doctrine of expatriation is not admitted, and the absentees remain British subjects."

Order of publication—general judgment is void.

Ellison vs. Martin, 53 Mo. 575.

A Court cannot render a judgment for alimony in a divorce case where the notice is by order of publication on a non-resident.

Ellison vs. Martin, 53 Mo. 575.

The constitutional rights of the courts of a state to adjudicate all controversies between parties is confined to cases *in personam* in which process it is served on the defendant within the State, or where the defendant voluntarily appears; and to cases *in rem*, in which the property or thing involved in the action is within the territorial boundary of the State, and has been seized by the process of the court.

The jurisdiction of the courts of a state cannot be extended beyond the territorial limits of the State in which they are situated in any manner inconsistent with the foregoing proposition. Any statute attempting to so extend it is unconstitutional and null and void, and an agreement between the parties to extend the jurisdiction of a court beyond the boundary of the State in which it is situated is null and void, and derives no support from such unconstitutional statute. It is as void as it would be had no such statute been passed.

See Insurance Company vs. Morse, 20 Wall., pp. 445 and 58.

The State whose jurisdiction is invaded by a process issued from another State, and which has exclusive jurisdiction over a person domiciled or situated within its boundaries, cannot be deprived of such exclusive jurisdiction by legislative enactment of a sister State or by a contract entered into by a citizen so domiciled within its territory while resident in another state.

As citizens of a sister State the Seligmans were not amenable to the laws of the State of Missouri unless found wtihin its jurisdiction. The constitution of our State does not give, nor could the Legislature confer upon the courts of Missouri, jurisdiction over the person of a citizen of another state.

Weil vs. Lowenthal, 10 Iowa, 575.

It is solely a question whether a state can acquire jurisdiction of an alleged debtor domiciled beyond the State by serving notice upon him in the state where domiciled, so as to authorize its courts to render a personal judgment or order a general execution against him.

It is well settled that the statutes of a state have no extra-territorial force. It is a necessary result of the independence and distinct soverignties of the several states.

Potter's Dwarris on Statutes and Constitutions, p. 361.

Waples on Attachment and Garnishment pp. 384-385.

No state in the Union has authority beyond its boundary in any of its departments, and it can therefore confer none upon its judiciary.

As well might the United States attempt to authorize its tribunals to adjudicate upon persons or property in another nation. Since jurisdictionless a judgment rendered against person or property beyond the state bounds are *coram non judice* in the state where rendered, as well as beyond it.

Waples on attachment and Garnishment, p. 338.

In D'Arcy vs. Ketchum et al., 11 Howard, U. S. Rep. 165, under a statute of the state of New York which provides that when joint debtors are sued and one is brought into court by process, if judgment shall pass for plaintiff he shall have Judgment and execution not only against the party brought into court, but against the other joint defendants in the original process in the same manner as if they had been personally served and brought into court by such process, this court held that a judgment so rendered against a firm in the state of New York, and doing business in pursuance of its laws, was void as to a non-resident member of the firm who was not a citizen of the state at the time of the rendition of the judgment.

In Ewer vs. Coffin, 1st Cushing, 23, the court held that personal service of notice in order to give the court of one state jurisdiction of a defendant who is a resident of another must be such a notice as the court has power to direct and must be served within its jurisdiction.

In Pennoyer vs. Neff, 95 U. S. 714, this court held that a personal judgment obtained in a state court in an action upon a money demand is void in the state where rendered as against a non-resident not served with process within the state, and that substituted service by publication against a non-resident is sufficient to inform him of the object of the proceedings taken, where the property is once brought under the authority of the court by seizure; but where a suit is brought to determine his personal rights and obligations, that is, where it is merely *in personam,* such service upon him is ineffectual for any purpose, and that process from the judiciary of one state cannot run into another state and summon a party there domiciled to respond to proceedings against him.

Process sent out of the state and process published within it are equally unavailing in a proceeding to establish personal liability.

The proceeding against the Seligmans was undoubtedly to establish a personal liability. It cannot be successfully contended that the proceeding was *in rem.* There was no property seized by the court and no property in controversy in the litigation. The alleged right to recover was founded on the allegation that Seligmans were indebted to the Memphis, Carthage & Northwestern Railway Company as the owners of unpaid stock in that corporation; that Wilson was entitled to have such indebtedness, to the extent of his judgment, applied to the payment thereof; and for that purpose was entitled to a judgment against Seligmans, and a general execution against their property, real and personal.

At page 720, in Pennoyer vs. Neff, *supra* this court says:

"Construing the latter provision to mean that in an action for money or damages, where the defendant does not appear in court, and is not found within the state, and is not resident thereof, but has property therein, the jurisdiction of the court extends over such property, the declaration expresses a principle of general if not universal law."

"The authority of every tribunal is necessarily restricted to the territorial limits of the state in which it is established; any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this Court, an illegitimate assumption of power to be resisted as a mere abuse."

Again at page 722 the Court says:

"The other principle of public law referred to, follows from the one mentioned. It is, that no state can exercise direct jurisdiction and authority over person and property without its territory.

Story on Conflict of Laws, Ch. 2.
Wheaton International Law, pt. 2, C. 2."

"The several states are of equal dignity and authority and the independence of one implies the exclusion of power from all others."

Again this court, at page 732 says:

"*A judgment which can be treated in any State in the Union as contrary to the first principles of justice and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered.*"

At page 733 this court says:

"To give such a proceeding any validity, there must be a judiciary competent by its constitution, that is, by the laws of its creation, to pass upon the subject matter of the suit; and if that involves merely the determination of the personal liability of the defendant, he must be brought within its jurisdiction by the service of process within the State, or his voluntary appearance."

In Smith vs. McCutchen, 38 Mo. 415, the Supreme Court of Missouri, held that a judgment *in personam* rendered in the courts of that State without personal service within the territorial limits of the State was null and void, not only as to the judgment defendant, but as to any of his debtors who were garnished on an execution issued on such judgment, and that a party summoned as garnishee by execution upon such judgment might defend by showing the invalidity of the judgment for want of jurisdiction, even though the proceeding is instituted in the state where the original judgment was rendered; holding that such a judgment is void in the state where rendered.

By the statutes of the State of Connecticut authorizing and governing the formation of co-partnerships or companies it is provided that service upon the corporation or company may be had by service of process upon any person who is a member of the firm or company resident of, or within the state. The Supreme Court of Massachusetts, in Phelps vs. Brewer, 9 Cush. 390, held that such a statute was void, and that service upon a member of the co-partnership or company did not authorize a judgment against a non-resident member of the firm.

In the case cited the co-partnership derived all its power and authority from the laws of Connecticut, and it was claimed that by entering into the copartnership the members of the firm agreed to submit themselves to the laws and consented to the mode of service on the co-partners provided thereby, and that they were estopped from denying the validity of the judgment; that by forming the copartnership each partner assented to that mode of service upon the copartnership as fully and completely as if the statute was embodied into the articles of copartnership, and that, in their dealings with the creditors, the statute authorizing service in the manner provided thereby, became a part of the contract, which was absolutely valid and binding upon all persons who voluntarily entered into the copartnership; yet, the Supreme Court of Massachusetts held it void as being an exercise of extra-territorial power by the courts of Connecticut and that a citizen of another state owed the state of Connecticut or itslaws no allegiance or duty even where he was a member of a firm, created an existing under its laws.

If the legislature of a state can pass a law by which it can acquire jurisdiction over the person of a non-resident debtor of a corporation by serving notice upon him beyond the boundaries of the state, on the ground that such non-resident is indebted to the corporation against whom judgment has been rendered in the state, and which judgment cannot be satisfied for want of property out of which to levy the same, and by virtue of such notice compel such non-resident debtor to appear and contest his liability in the courts of such state or in case of his failure to appear in response to such notice, render judgment and issue a general execution against him by which he can be deprived of his property; then any state in the Union can draw to itsself jurisdiction over the citizens and subjects of every state or nation in the civilized world who may at any time do business within its tertitory, by providing that, as to such business, the courts of the state shall have jurisdiction over them and that process may be served either personally, if found within the state, or by publication or notice served beyond the state.

II.

A stockholder in a corporation is not a party to an action brought against such corporation in the sense that the court, by acquiring jurisdiction over the corporation, thereby acquires jurisdiction over the person or individual property of the stockholder; the court can only acquire jurisdiction over the stockholder by service of notice or process upon him within the state.

Hardwick vs. Jones, 65 Mo 54.
Whitman vs. Cox, 26 Me. 335.
Merchants' Bank vs. Cook, 4 Pick. 405.
Adams vs. Pres., etc., the Wiscassett Bank, 1st Greenl. Rep. (Me.) 361.
Hannah vs. Moberly Bank, 67 Mo. 678.

A stockholder is not liable as in the case of partnership.

Savings Association vs. Kellogg, 63 Mo. 540.
Perry vs. Turner, 55 Mo. 418.

By section 399 of the New York code a party to an action or a person for whose immediate benefit it is prosecuted or defended is disqualified from testifying in the case. The Court of Appeals of New York held that a stockholder in a bank is not a party to the action nor a person for whose immediate benefit it is prosecuted.

Montgomery County Bank vs. Marsh, 7 N. Y. (3 Selden) 481-485.

In Berkley vs. Insurance Company, 26 Mo. 490 the court held that a stockholder in a corporation was not a party to an action prosecuted by or against the corporation, although in case of a deficiency of corporate property his individual property would be liable to be taken on execution in double the amount of the stock held by him.

The question decided by the Court in this case arose as to the competency of a stockholder as a witness for the corporation, under the provisions of the statute of Missouri which disqualified any party to an action, or for whose immediate benefit it is prosecuted or defended, from testifying in the case.

The Court held that it was not prosecuted or defended for the immediate benefit of the stockholder, and that he was in no sense a party to the action.

In Blackburn vs. Central Railroad, etc., Co., 58 Ga. 189, the Court held that when a corporation, as such, is sued, the *stockholder, as such, is not before the Court, and no party to the action.*

In Hardwick vs. Jones, 65 Mo. 54 the Court held that a stockholder was not a party to a suit brought by or against the corporation in which he owned stock, nor interested in it so as to disqualify him from acting as an officer in serving process in such case, or making a sale by virtue of an execution issued therein; although parties to actions, or for whose benefit the same are prosecuted, was prohibited by the statute from serving process in it.

The Court also held that an execution sale conducted by a sheriff, who was a stockholder in a bank that purchased at the sale was not void; notwithstanding the statutes prohibited the sheriff from being interested in a purchase made at an execution sale conducted by him.

In Bank vs. Cook, *supra*, the Supreme Court of Massachusetts held that a stockholder was not a party to the action; and the decision of the Supreme Court of Maine in Adams vs. The President, etc., 1 Greenl. Rep. 339, was to the same effect.

The doctrine was reiterated by the last named Court in Whitman vs. Cox, *supra*.

It would follow from the law as declared in these cases that in a proceeding by which a court acquires jurisdiction over a corporation, it does not thereby acquire jurisdiction over the person of all or any of the stockholders of such corporation.

It is well settled in Missouri by the cases of Hardwick vs. Jones; Whitman vs. Cox; Merchants Bank vs. Cook; Adams vs. President, etc., and Hannah vs. Moberly Bank, *supra*, that a judgment against a corporation is in no sense a judgment against the stockholder; and the stockholder of the corporation is in no manner or form a party to the action, and it creates no lien upon his property. How then can it be held that the courts of Missouri acquire jurisdiction over the Seligmans, citizens of New York, to render a personal judgment against them, or order ageneral execution upon which their property can be seized and sold. It is contended that this can be done because they were indebted as stockholders to an insolvent railway corporation, and that the proceeding by motion is in the nature of a garnishment. If this position is correct, what then is to prevent the State from providing that any person indebted to a judgment debtor in Missouri may be brought within the State by notice of a garnishment, and compelled by the decree or judgment of the court to pay into court the amount he may owe, or deliver to the officer of the law any property or assets which he may have in his hands belonging to the judgment debtor? But an attempt is made to avoid this proposition on the ground that the proceeding by motion against the Seligmans was not an originally proceeding; *that it was in aid of or auxilliary to the main suit against the Memphis, Carthage & Northwestern Railway Company. Unless by obtaining jurisdiction over the corporation last named the Court also obtained jurisdiction over the Seligmans, for the reason that they were stockholders and indebted to it, then it is an original proceeding against the* Seligmans; and it is established by the authorities last above cited that the court did not acquire jurisdiction over the Seligmans, and that they were in no sense parties to the suit of Wilson against the Memphis, Carthage & Northwestern Railway Company; therefore, if it did not acquire jurisdiction, the suit against the Seligmans is an original proceeding as to them.

In Pennoyer vs. Neff, 95 U. S. 714, and Smith vs. McCutchen, 38 Mo. 415. It is held that a judgement rendered against a citizen of a sister state on constructive service is an absolute nullity in the state where rendered as well as in any State where it is attempted to be enforced.

It is contended by plaintiff that the proceeding by motion is supplementary and a mere sequence to the action wherein the judgment has been rendered against the insolvent corporation, and it is not treated by the courts as an independent action either at law or in equity; therefore that they can acquire jurisdiction over the stockholder by service of notice on him beyond the State.

In support of this theory the cases of Buford vs. Strather, 3d McCrary, 256; Webber vs. Humphreys, 5 Dillon, 223, and Nations vs. Johnson, 24 Howard, 195, are cited. None of these cases sustain the position taken by counsel for plaintiff. The question of jurisdiction over the nonresident is not raised in any of them.

In Nations vs. Johnton, *supra*, both parties appeared and contested the case. The defendant failed to appeal within the time allowed by statue, but subsequently, long after the term had elapsed, sued out a writ of error to the appellate court, in accordance with the provisions of the statute of the state, which required, that if notice could not be served within the state upon the defendant in error it might be served by publication. The court held such notice sufficient. This case in no wise conflicts with our position in the case at bar. In Nations vs. Johnson, the court had acquired jurisdiction of the defendant in error, when it rendered judgment against him; the case was contested by him in the court, and the Legislature might entirely dispense with any notice afterward in case of appeal, or the suing out of a writ of error; the giving of such notice was but a matter of grace; and the Legislature, in its discretion, might dispense with it entirely.

Not so in the case at bar. The court never acquired jurisdiction over the Seligmans except it should be held that the notice served in a sister state conferred jurisdiction.

Again, counsel for plaintiff contend that a judgment against the corporation is a judgment against all its members or stockholders, *since none of them are permitted to deny the existence or amount of liability thereby ascertained.* This is a controverted position, however, and the weight of authority is, we think, to the contrary; but conceding for argument's sake that they cannot contest the judgment rendered against the corporation, yet it is only to the extent that such judgment may reach the corporate property. But in the case of an individual liability of a stockholder to the corporation he certainly has the right to a trial as to his liability. In the case at bar the Seligmans were entitled to a trial as to whether they were stockholders; and if stockholders, as to whether they were indebted to the corporation for their stock.

And before the Court of the State of Missouri could pass on either of these questions it must have acquired jurisdiction over the Seligmans by the service of process on them in this State.

A summary proceeding against a stockholder of an insolvent corporation, in accordance with the provisions of Section 736, Revised Statutes of Missouri, 1879, is in the nature of an original action, the notice required to be given partakes of the nature of an original process, and service of notice beyond the boundary of the State, or by posting in the office of the clerk of the court will not confer jurisdiction; therefore a judgment rendered upon such service is void and of no binding force or effect in the State where rendered or elsewhere. Service of notice on the stockholder within *the territorial limits of the State is contemplated by the statute.*

The State has full power over person and property within its jurisdiction, but cannot extend its processs beyond its boundaries.

Howell vs. Menglesdorf & Co., 33 Kansas, 194.

This case in all particulars involves the same questions as the one at Bar.

The Missouri statute on the subject of execution against stockholders in an insolvent corporation is a copy English statute, 8 and 9 Vict., ch. 16, sec. 36, with respect to the remedies of creditors of an incorporated company against a shareholder. It is enacted—

"That if any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up; provided, always that no execution shall issue against any shareholder, except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open Court after *sufficient notice* in writing to the person sought to be charged; and upon such motion, such court may order execution to issue accordingly. * * *"

This statute will be found in Jacob's Fisher's Digest, vol. 7, p. 11, 385.

The statute cited embraces all that is contained in sections 736 and 737 of the Missouri statutes which provide that no execution shall issue against any stockholder except upon an order of the court in which the cause, suit or other proceedings shall have been instituted, made upon motion in open court after sufficient notice in writing to the person sought to be charged, and upon such motion such court may order execution to issue accordingly," etc.

Under the English statute, which is similar to that of Missouri, the English courts hold that service of the rule for execution against a shareholder must be *personal.*

Edwards vs. Kilkenny & Great Southern & Western Railway Company, 1 C. B. (N. S.), 409.

Ilfracombe Railway Co. vs. Devon & Somerset Railway Co., 2 L. R. C. P., pp. 15 and 18.

In Edwards vs. Kilkenny & Gt. S. & W. Ry. Co., *supra,* being a proceeding by a motion for execution against a stockholder of an insolvent corporation for judgment for the amount which he was indebted on his stock, counsel moved to make absolute the rule for execution against the shareholder in the K. & G. S. & W. Ry. Co., the rule had not been served personally on the shareholder, but upon receiving notice of it he referred it to his attorney and the attorney receiving the rule stated that no cause had been shown.

Cockburn, C. J., held: "The statute requires the rule to be served upon a party or at his place of abode. He has not been served nor has an attempt been made to serve him, but his attorney has been served. It will not do. The rest of the court concur and the rule is discharged."

Here the English court on a statute precisely similar to ours held that the service must be personal, and that service on an attorney would not answer, and discharged the rule to show cause why an execution should not issue, because the service had not been had, and hence, the court had not acquired jurisdiction over the person of the alleged stockholder. The state of Missouri in adopting the English statutes cited, adopted the construction placed thereon by the court of that Kingdom.

In Ilfracombe Ry. Co. vs. Devonshire & Somerset Ry.

Co., *in re* Lord Poltimore, *supra,* which was a proceeding on motion under the English statute referred to, by the judgment creditor of an insolvent corporation to compel the stockholder to satisfy the judgment to the extent of his indebtedness to the corporation, on account of stock issued to him, the Court held that the service of such notice must be personal, and that such notice could not be served upon the attorney of the stock holder.

"Keane, Q. C., afterwards imitated that that the rule *nisi* had not been served upon the shareholders personally, but upon his attorneys, who had given an undertaking to appear for him.

Per curiam: that will do, though in case of notice, personal service is required."

Thus holding that the notice of the motion must be served personally on the alleged stockholder.

To the same effect is the decision of the Kansas Court in Howell vs. Menglesdorf, *supra,* and which is on "*all fours" the case at Bar.*

In the case of Howell vs. Menglesdorf, *supra,* (33 Kansas 193), the precise question of jurisdiction involved in this case is decided in favor of the defendant in error. The Kansas Supreme Court (all judges concurring) held the judgment void for the reason that the notice of motion for execution against the stockholder was served beyond the boundary of the state, and therefore the judgment of the court was void.

The question of the validity of the judgment sued on in this case was determined at the October term 1891, by the Supreme Court of the State of Missouri, in which case, plaintiff in error was apellant and the deeendant in error respondent. The Supreme Court of Missouri, held the judgment void, and that the service of notice an the Seligmans in New York, and the posting of notice in the clerk's office did not confer jurisdiction on the State Court to render a *judgment, or order an execution against the Seligmans, and that the entire proceedings against the Seligmans in the State Court was void, and of no force whatsoever. This decision interpreting the statutes of Missouri, is binding on this Court, and conclusively settles the question in dispute, the Supreme Court of the State of Missouri holding that the judgment sued on could not be rendered on service obtained beyond the State, or by posting notices in the clerk of the Court's office in the State; that it was a proceeding "in personam," and that the State Court failed to acquire jurisdiction of Seligmans. Therefore judgment was a nullity. (See opinion of the Supreme Court of Missouri, Appendix A).*

Previous to the trial of the case at Bar before Judge Brewer, upon proper proceedings instituted in the State Court by the defendant in error, the State Court set aside and anulled the pretended judgment, sued on in this case, holding that the same was void for the reason the trial Court did not, by the service of notice in New York; or the posting of notice in the clerk's office, and the delivering of a copy thereof to Col. Broadhead, acquire jurisdiction of the Seligmans, and therefore the entire proceedings was void and of no force or effect. (See opinion of Valliant, Judge of the State Court. Appendix B., also opinion of Judge Brewer, of the United States Circuit Court. Appendix C).

IV.

The statutes of Missouri did not authorize the service of notice of motion for execution on a stockholder beyond the boundary of the state; hence the service had, and subsequent proceedings in pursuance thereof are in any event void. Section 736, Revised Statutes Missouri of 1879, under the provisions of which the motion for execution against the Seligmans was made and filed, provides that there shall be sufficient notice in writing to the persons sought to be charged as a stockholder. The statute is silent as to the mode or manner of serving this notice, however the object of the proceedings being to establish the liability of a stockholder as a debtor of a corporation. The motion is in the nature of an action "in personam" and to confer jurisdiction, the process of the court must be served within the boundary of the state ; but it is insisted that this notice may be served under the provisions of chapter 59, Revised Statutes of Missouri 1879, entitled "Of Practice in Civil Cases."

Section 3505 of the chapter last cited, provides that the notice contemplated by that chapter, may be served in the following manner:—

"Notice how served, The notice shall be in writing and shall be served on the party or his attorney in the manner prescribed in this article, unless otherwise provided by law." And that, "The service may be made by delivering to the party or his attorney a copy of such notice, or by leaving a copy at the usual place of abode of the party or his attorney, with some person over the age of 15 years or with the clerk of the party or his attorney."

The notice here referred to, is clearly a notice in a suit then pending, in which the Court has acquired jurisdiction of the party upon whom the notice is to be served, for the statute provides that it shall be served on him or his attorney, i. e. his attorney of record in the case. It cannot be held that a lawyer is an attorney in a suit which is about to be instituted, so that process or notice can be served upon him as such attorney, because he has acted as the attorney of the same party in another suit in the same or in other courts.

It is evident from the sections following that the construction here contended for is the true one, for by section 3506 it is provided :

"How served on non-resident; if neither the adverse party nor his attorney (i. e. attorney of record) reside in the State, such notice may be put up in the office of the clerk of the court wherein such suit is pending or proceedings are intended to be had."

Thus it will be seen from this statute that the notice contemplated by this chapter may be served upon the defendant, if resident within the State, or upon his attorney, or if a non-resident, by posting in the office of the clerk of the court in which the suit is pending or the proceedings are had.

It follows if plaintiff's counsel is correct, the notice in this case would be good and sufficienr if it was only posted in the office of the clerk of the court.

Section 3507 provides that the time shall be at least five days, etc., and contemplates only notices which are auxilliary to the main procceings or action.

"All notices, orders and rules required to be served in the progress of the case shall be served in like manner as in other civil cases."

This notice must be served in like manner, then, as in other civil cases.

A notice or process by which jurisdiction is acquired in *civil actions for a money demand, in order to authorize a personal judgment or the award of an execution against property not seized by the process of the court in the proceeding, must be served on the defendant within the State* in order to confer jurisdiction.

The notice in such cases takes the place of process in the ordinary civil case, and in order to give the court jurisdiction to render a personal judgment, must therefore be served in like manner. This is the construction that has always been placed on such statutes by the courts whenever the question has been presented.

Service of notice or process against a non-resident in a sister state can only be had in proceedings *in rem.* There is no statute of Missonri authorizing the service of process or the notice by which the court acquires jurisdiction beyond the state and if such an enactment existed it is void.

The case of Howell vs. Menglesdorf, 33 Kansas, 194, is decisive of this case. The Supreme Court of Kansas held the service of notice on the defendant beyond the State void. The Kansas statute is substantially a copy of the Missouri statute, and the same question was involved. The Supreme Court of Missouri at the October term 1891, in an action in that Court by appeal between plaintiff and defendant in this case, *held that the judgment in controversy in this case was null and void, and that the service had on the Seligmans in New York was unauthorized, and the State Court in Missouri did not acquire jurisdiction of the Seligmans by virtue thereof.* (See opinion of the Missouri Supreme Court. Appendix A.

POINTS MADE IN ARGUMENT.

Ist. The notice served beyond the bounday of the State did not give the court jurisdiction over the Seligmans, and the judgment rendered against them and execution issued in the proceeding are void.

2nd. The statutes of Missouri does not attempt to authorize the service of notice on a stockholder beyond the State; therefore the service had was unauthorized, and all subsequent proceedings in pursuance thereof are void.

3rd. A stockholder in a corporation is not a party to an action brought by or against such corporation in the sense that the court by obtaining jurisdiction over the corporation, thereby acquires jurisdiction over the person of the stockholder and his individual property, so that it can render a personal judgment against him.

In a suit brought by or against a corporation, the corporation for all purposes, represents the stockholder so far only as his interest in the corporate property is concerned, and no judgement can be rendered in the proceedings except a judgment effecting only the corporation or corporate property, and to that extent only is the judgment of the court in a controversy involving corporate rights or property binding upon the stockholder.

The corporation is the legal enity of which the court has jurisdiction, and a stockholder is only interested in the controversy, because of his interest in the corporate property may be effected by the judgment rendered therein, and he is in no sense a party to the action, nor does the court in acquiring jurisdiction over the corporation, by that act, acquire jurisdiction over the stockholder so as to authorize it to render a personal judgment against him.

Howell vs. Mengelsdorf, 33 Kan. 194, and Wilson vs. Seligman, decided by the supreme Court of the state of Missouri, October Term 1891, and not yet reported. (For opinions see Appendix A.) determines the question involved in the case at Bar against plaintiff in error.

Seligman was not a stockholder in the Memphis, Carthage & Northwestern Railway Company. The Supreme Court of the State of Missouri in the case of the Union Savings Association vs. Seligman, 92 Mo. 635, held that Seligman was not a stockholder in the Memphis, Carthage & Northwestern Railway Company. This Court reached the same conclusion in the case of Burgess vs. Seligman, 107 U. S. Rep. p. 20. The stock referred to in both these cases is the identical stock on which judgment was rendered in the case. Seligman was not a stockholder, and therefore there was no liability, plaintiff in error obtained the judgment in the trial court only because the proceedings were "ex parte." The defendant not appearing in the case the court failing to acquire jurisdiction over him. This court and the Supreme Court of Missouri have held that Seligman was not a stockholder and therefore not liable. *The Supreme Court of Missouri in an action between the parties, plaintiff and defendant, in this case, at the October Term 1891, of that Court, held that the judgment sued on in the case at Bar was void. The State Court in which the judgment sued on was obtained, vacated and annulled the same. (See opinion of Judge Valliant of the Trial Court. Appendix C).*

This case now stands thus: The trial court vacated and set aside the judgment sued on, for the reason that it was void. The Supreme Court of the State of Missouri, in an action involving the validity of the same judgment between the parties to this action, held the judgment void; Justice Brewer, of the United States Circuit Court, now Judge of this court, on the trial of the case in the Federal Court held the judgment void, we have the decision of three courts in favor of the defendant in this case, and all agreeing that the judgment in controversy is void.

It makes no difference whether we call the notice required by the statutes of Missouri, summons or notice, neither does it make any difference whether we call the proceeding a suit or only a sequence to an action; it is sufficient to say that the court is to hear and determine the question of personal liability, and that the judgment it may pronounce is in fact a personal judgment; that it cannot do this unless it first acquires jurisdiction if the person sought to be charged is a universally recognized principal of law.

CASES CITED BY PLAINTIFF IN ERROR.

Cites the case of Canada Southern Railroad vs. Gebhard, 109 U. S. 527, as the authority for the position that a state in which a railroad company is chartered and organized has a right to invade the jurisdiction of a sister state, and compel the appearance in its courts of a stockholder there resident or being, to litigate the question of his individual liability as a stockholder in such corporation.

The case cited is not authority for the position taken. The Canada Southern Railroad, a corporation created in Canada to build and operate a railroad in that dominion, derived all the power to contract from the Canadian government.

The corporation being insolvent, a large majority of the creditors and shareholders agreed upon a plan of adjustment which would enable the company to go on with its business, accommodate the public and protect its creditors, to the full extent of the available assets and property of the company in the Dominion, and the Court held that the Dominion Parliament had the legislative power to legalize the plan of adjustment, as agreed upon by a majority of those interested, and thereby bind the minority bondholders.

The power was known and recognized by the courts throughout the Dominion when the corporation was created and all its bonds were executed, put on the market and sold, in fact such power was part of the sovereign right of the Dominion government: to amend, alter and change the charter of the corporation; and it operated only upon the corporate property situated within the territorial jurisdiction of Canada, and affected the interest of the plaintiff only in so far as he was interested as a stockholder or bondholder in the property situated in Canada and of which the court had jurisdiction,

There is nothing in this case which conflicts in the least with the position taken by the respondent in the case at bar. The general statutes of Canada composed a part and parcel of the charter of the Canada Southern Railway.

The government has a right to change, alter and amend the charter; therefore, when the corporation became insolvent, and a majority of the stockholders agreed upon a plan of reorganization, the government, through its legislative department authorized the reorganization on the plan agreed upon. This was simply an amendment of the charter of the corporation, and as held by the court, the Dominion Parliament "had the legislative power to legalize the plan of adjustment." Canada Southern Railroad vs. Gebhard, 109 U. S. p. 533.

The case of Nations vs. Johnson, 24th Howard, U. S. R. p. 195, is relied on by appellant as authority to sustain the position that constructive service obtained beyond the state conferred jurisdiction over defendant on the trial court.

An examination of the case will establish the contrary of that contended for by appellant.

In that case personal service was had upon the defendant; both parties appeared in the trial court and contested the case. On a final hearing the plaintiff's bill was dismissed; plaintiff gave notice of an appeal, but failed to perfect his appeal within the time allowed by the statutes of Mississippi. Subsequently, within the time allowed by the statute of Mississippi, he sued out a writ of error, but in the meantime, the defendant had removed from the State. The statutes of Mississippi provided that the notice of the issuance of a writ of error should be given by service of the writ upon the defendant's attorney of record or upon the defendant, if resident within the State; if not, by publication in a newspaper. The defendant being beyond the State, notice of the issuance of the writ was given by publication.

The defendant failed to appear in the appellate court, which reversed the decision of the lower court, and gave judgment for the plaintiff. Upon this judgment suit was instituted in the State of Texas, where the defense was made that the appellate court which reviewed the case in Mississsippi had not acquired jurisdiction, inasmuch as the notice of the issuance of the writ of error had been given by publication. The Texas court held to the contrary, and the decision of the last named court was affirmed by the United States Supreme Court, that court holding that the notice of the issuance of the writ of error was not an original process, but that it was simply notice of a continuation of the original case, and the appellate court simply reviewed the judgment of the trial court, which might be done without notice, either constructive or personal, had the legislature so provided.

The question in Nations et al. vs. Johnson et al. was whether a party duly served with notice in the trial court, after he had appeared and answered to the suit, and secured an erroneous judgement in his favor, might voluntarialy absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication pursuant to the law of the jurisdiction from which he has thus voluntarialy with drawn. We think not. To admit the proposition would be to deprive the party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court.

The trial court having acquired jurisdiction over the person, that jurisdiction continues and remains through all intermediate steps, until a final determination of the case in the court of last resort, and after the jurisdiction of the trial court is acquired by the service of notice within the

State, the character of the notice thereafter to be given in intermediate proceeding such as appeals, writs of error, etc., is a matter of legislative wili, and involves no constitutional right ; the legislature might entirely dispense with the service of notice of appeal, or issuance of writ of error.

In conclusion, plaintiff in error should not prevail in this case for the following reasons:—

First, As decided by the Supreme Court of the State of Missouri, in the case of the Union Savings Association vs. Seligman, supra, (92 Mo. 635) and Burgess vs. Seligman, supra, (107 U. S. 20), the Seligmans were not stochholders in the Memphis, Carthage & Northwestern Railway Company; hence there was no liability as stockholders on their part, and Wilson was not entitled to judgment against them.

Second, As decided at the October Term, 1891, by the Supreme Court of Missouri, (case not yet reported. See opinions in Appendix A) the State Court did not acquire jurisdiction of Seligman by the service of notice upon him beyond the boundary of the State, and the judgment rendered in this case against Seligman was void for want of jurisdiction. The Supreme Court of Missouri followed the decision of the Supreme Court of the State of Kansas in the case of Howell vs. Menglesdorf & Co., 33 Kan. 194, and of this court in the case of Pennoyer vs. Neff, 5 Otto. 714, and of the Supreme Court of Missouri, in Smith vs. McCutcheon, supra, (38 Mo. 415) the question involved in the case of Howell vs. Menglesdorf was identically the same as that involved in the case at Bar. In the last mentioned case, under a statute of Kansas which was in all particulars the same as the Missouri statute, proceedings were instituted against a stockholder of an insolvent corporation of the State of Kansas to obtain an execution against him for the amount which he owed the corporation on his stock. Ser-

vice of notice for execution was served on him beyond the State of Kansas, and in the State of Illinois, of which he was a citizen. The Court held the judgment or execution obtained on such notice was void for want of jurisdiction.

Third, Before the trial of the case at Bar in the United States Circuit Court, the judgment sued on was by appropriate proceeding set aside, vacated and annulled by the State Court in which it was obtained. The plaintiff in error was a party to this proceeding, and he has not appealed from the decree of the State Court vacating and annulling the judgment sued upon. (*See opinion of Valliant, Judge of the trial Court. Appendix C.*

Plaintiff in error contends that the Statute of Missouri authorizes service by notice beyond the boundary of the State or by posting in the clerk's office, in proceedings for judgment and execution against the stockholder of an insolvent corporation. The Supreme Court of Missouri holds that such service was unorthorized by statute. (See opinion of Supreme Court, in Appendix A, page) Which opinion was rendered in a case between the parties to this suit involving the validity of the judgment in controversy in this case. The Supreme Court of Missouri says: "*It is plain from these statutory provisions that they refer, as their terms would naturally import, to a suit then pending in a court which has already acquired jurisdiction of the party to be served with the notice.*" * * * *But the personal notice in this case having been served outside of the State has not been served according to law , for the statute nowhere permits or directs this sort of service; therefore the notice in question was a nullity. And again, the court says,* "*But if the Statute did in terms require the personal service of such notice outside of the state on a non-resident, in order to the rendition of a personal judgment or its equivalent on money demand, such statute would be wholly void as to such extra territorial service.*"

It is contended on the part of the plaintiff in error that the stockholder is a party to the judgment against the insolvent corporation, and therefore the judgment against the corporation was binding upon the stockholder personally, as the court by obtaining jurisdiction of the corporation acquired jurisdiction of the stockholder; hence the service beyond the boundary of the state was good. The supreme Court of Missouri, however, decided in the case of plaintiff in error in this action against the defendant in error, precisely to the coutrary. (See Appendix A.) In which the Court says: "*The stochholder is not in any sense a party to the judgment which the Court rendered against the* *corporation, nor does such judgment bind his property.* And in order to bind a stockholder in a corporation who is the debtor of such corporation, he must be subject to the process of the court, by being found and served within its jurisdiction."

"The process against the defendant Seligman, was in substance and nature, a process of garnishee."

The Court again says: "There are indeed strongly resemblant features between process which summons for judgment, a stockholder, and process which summons for like purpose, an ordinary party as garnishee. *In either case, notwithstanding the proceedings is some times said to be auxilliary to the main one, yet in both the movement against the stockholder as well as the garnishee, is an independent and orginal action, and so this Court has treated it in regard to stockholders."*

"*In process whether notice, writ or motion, which when served on a party, will have the effect to authorize an order or judgment in personam against him, upon the rendition of which a general execution may issue leviable all the property in the state of which he may be possessed, cannot be regarded in any other light so far as that party is concerned, than as an independent proceeding.*" * * * *In either case the proper service of the process in all respect is essential to the jurisdiction of the Court, and essential also in that it must meet the constitutional mandate respecting due process of law.* The law regards the substance of things, not their shadows.

Respectfully submitted,

JOHN O'DAY & JAMES O. BROADHEAD,

Attorneys for Defendant in Error.

"APPENDIX B."

STATE OF MISSOURI, }
CITY OF ST. LOUIS. } *ss.*

IN THE CIRCUIT COURT CITY OF ST. LOUIS.

W. C. WILSON }
vs. } 61,875.
JESSE SELIGMAN *et al.* }

In April, 1883, plaintiff obtained a judgment in this court against the Memphis, Carthage and Northwestern Ry. Co. for $72,799.38 on which execution issued and was returned *Nulla bona.* After which, on 2d July, 1883, plaintiff served a written notice on Jesse and James Seligman in the City of New York, which is their domicile, that he would, at the City of St. Louis, on the first day of the October term, 1883, of this court, moved the court for an execution against them as holders of unpaid stock in the railroad company, to satisfy his judgment under the provisions of section 736, Revised statutes. Pursuant to that notice the plaintiff presented his motion in this court which was heard by the court and sustained and execution awarded against the Seligmans accordingly for the amount of the plaintiff's judgment. Upon the hearing of the motion the Seligmans did not appear, and the proceeding as to them was *ex parte,* although the court was aided by the advice of eminent counsel who appeared as *amicus curiæ* and resisted the motion.

The Seligmans now appeared and moved the court to quash execution and vacate the order on which it was issued, on the ground that the court had no jurisdiction over them. The only question that the record now presents to the court is, was the motion which was served on the Seligmans, at their domicile in New York, sufficient to give this court jurisdiction over them in this matter?

The question was discussed and carefully considered by this court, when the motion to award the execution was heard, and it was then concluded that the notice was sufficient. The question of jurisdiction, however, is the one vital question in a case that is never at rest, but may be raised and urged at any stage.

Here are two citizens of a distant state who are notified by an unofficial document to appear in, what is to them, a foreign tribunal, and defend against a demand of the plaintiff for satisfaction out of their property of a large amount of money; they do not appear, the court proceeds to hear the evidence offered by their adversary, and renders what is in effect a personal judgment against them. That is one way of stating the case. On the other hand it is stated thus: The summons in the original suit was duly served in this state on the railroad company which is a Missouri corporation; the service of process on the corporation is equivalent to service of notice on all the stockholders for all the purposes of that suit; and, it is argued, if citizens of another state see fit to take stock in a corporation of this state, they take it burdened with the conditions that the laws of this state impose upon it; that among these conditions is the personal liability sought to be imposed by this proceeding, which is not a suit, but only a sequence to the suit against the corporation.

Although there is a good deal of artificial reasoning in this statement of the case, and possibly some fallacy, yet, it is a very strong way of putting it, and it is the view that this court took when it awarded the execution.

The authorities clearly support the general proposition that a stockholder is for all the purposes of his interest in the corporation considered as in court in a suit against the corporation, when process has been duly served on it. But this proposition can be carried no further than to affect him in his character as stockholder; he is bound by the judgment against the corporation, not as an individual, bnt only as a stockholder. If then, the motion for an execution against him is a proceeding which affects only his interests as a stockholder, there is much force in the plaintiff's argument, but if it is a proceeding to effect him as an individual beyond his interest in the corporation, the argument is not so strong.

How can the proceeding against him for an execution be said to affect him as a stockholder? One's interest as a stockholder is affected only by an act that either enhances or diminishes the value of his stock. The issuance of an execution *de bonis propriis* has no affect on the value of his stock or of the property in the corporation which it represents. Neither does the fact that he is a stockholder render him liable to have such an execution issued against him. His liability in this respect arises, not because he is a stockholder, but because he is indebted to the corporation for stock. He does not owe that debt in his character only as a stockholder, if he did, then, only his interest as a stockholder, or his interest in the corporation would be liable for the debt. But he is liable for the debt as an individual, it is his personal obligation.

Some differences in opinion have been expressed as to whether this proceeding is in the nature of a suit or not. It has been likened by one to an abbreviated suit in equity, by another it is said to be only a mode of execution, and it is generally regarded as a sequence to the original suit. It seem to me that although it is a proceeding some respects *sui generis*, it more resembles the process of garnishment on execution than any other proceeding.

The execution asked for may run not only against the alleged stockholder's interest in the corporation if he have any, but against any other property he may have.

By whatsoever name we may call it, the effect, within the limits of this state, of the order for such an execution is the same as a personal judgment him against for the amount of the debt.

The statute uses the term stockholder in this connection, but it is manifest from the contest that that term is used only as a description of "the person sought to be discharged." The statute would be meaningless and ineffectual if it affected the person only in the character of stockholder, which, as we have seen, is the only character in which he is in court by the original process against the corporation.

It seems to me therefore that this is a proceeding to affect the Seligmans as individuals, and not merely in their character as stockholders; and that even if it be conceded that as stockholders they were, in contemplation of law, served with process, by the service on the corporation in the original suit, they would still be unserved with process as individuals, and, as such, would be strangers to the record.

If this be correct, and if counsel for plaintiff are correct, when they say that the notice contemplated by the statute is not process, then it follows that to take the property of the Seligmans, under this execution is to violate Sec. 30, Art. 2, of the State Constitution depriving them of their property "without process of law."

But if the proposition should be carried to the extent that the argument of plaintiff's counsel would seem to lead so as to say that when process is served on the corporation, all individuals who hold stock may be proceeded against, in their individual capacity, for their personal liability without further process, it would still leave the vital question in this case undecided, for it would still leave open the question of who are the stockholders. Upon this question, any one sought to be charged as such entitled to be heard, and if he is entitled to a hearing, we cannot proceed to pronounce judgment against him in his absence, unless we have served him with process. According to the plaintiffs argument, if he is a stockholder, he is to be considered as served with process, by the service of the original writ on the corporation. but if he is not a stockholder he is not to be considered so served. We cannot then, according to this theory, determine whether he is to be considered as served with process, until we first determine whether or not he is a stockholder, and we cannot try that question, until we have served him with process.

Counsel for plaintiff, in their very able and exhaustive brief contended that the jurisdictional fact that the Seligmans are stockholders, if a fact found by the court as appears on the face of the record, and that that finding is *prima facie* evidence of the fact.

The finding of the court is held to be *prima facie* evidence of the jurisdictional fact, because the law presumes that the court will not assume to try a question which it has no right to try, or to pass judgment on the rights of parties who are not before it. But if the whole record in the case shows that the court aid act without authority, the presumption will not be indulged in its favor.

If it be conceded in this case, that the Court had no jurisdiction to try the question of whether or not the Seligmans were stockholders, unless they were before the court by some legal process, then it will not help us any to say that the record shows that the court has tried that question and found the facts to be so, if the same record shows that in fact, there was no legal process. To say that the court under such circumstances, has found that they were stockholders, is but to reason in a circle and come back to the point from which we started.

When the motion to award an execution in this case was before this court in 1883, our Supreme Court had before them in three cases, on the same state of facts as were then shown to the court, decided that the Seligmans were holders of unpaid stock, and as such liable for the debts of the Railroad Company. Doubtless those decisions, whilst they did not remove the question of jurisdiction from the case, were yet very strong persuasions with this court. But since then our supreme Court has reversed its decision in those cases, and has held, on the same state of facts, that the Seligmans are not stockholders within the meaning of the statute. And also since then, the Supreme Court of Kansas, construing a statute of that State, copied literally from ours, so far as the features under consideration are concerned, has decided that a notice like this, served in the city of Chicago was not sufficient to confer jurisdiction on the Court in Kansas.

Howell vs. Menglesdorf, 33 Kas. 194.

If this Court had had the benefit of those later decisions, it may be doubted if the execution would have been awarded.

It makes no difference whether we call the notice required by the statute *scire facias*, summons or notice; neither does it make any difference whether we call the proceeding a suit, or only a sequence to a suit, or whether there should be written pleadings or not, the substance of the matter is, that the court is to hear evidence and judicially determine questions of liability, and may pronounce judgment thereon, that is, in effect, a personal judgment against "the persons sought to be charged." This cannot be done under the provisions of the Constitution of this State, "without due process of law."

The universally recognized principle of the law of nations that the process of the state cannot extend beyond its territory, has even more reason and justice to support it in its application between the States of this Union, than between nations foreign to each other.

It follows from the above conclusions that the notice served on the Seligmans in New York was not sufficient to give this court jurisdiction over them, and the awarding of execution against them was without authority.

The motion to recall and quash the execution is sustained.

Sept. 5th, 1887. L. B. V.

"APPENDIX C."

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

WILLIAM C. WILSON,
VS.
JESSE SELIGMAN.

OPINION.

Brewer, C. J.

The facts in this case are these: Plaintiff in the Circuit Court of the city of St. Louis, on April 2, 1883, recovered a judgment against the Memphis, Carthage & Northwestern Railroad Company, a corporation created under the laws of the State of Missouri, for $72,799.38. Execution was issued on such judgment and returned unsatisfied. On the 9th day of July, 1883, a motion in writing was filed in the said court for an order directing the issue of an execution against this defendant as an alleged stockholder in such corporation under the provisions of Section 736 of the Revised Statutes. The defendant being a non-resident, and not found within the state, notice of this motion was served upon him personally in the State of New York, the place of his residence. Notice was also published by posting in the Clerk's office in St. Louis. On the 3rd day of December, 1883, defendant not appearing, the motion was sustained, and execution ordered in favor of the plaintiff against the defendant.

Thereafter, on the 9th day of May, 1887, a suit was commenced in the Circuit Court of St. Louis by this plaintiff against this defendant upon such judgment and order; defendant, being within the State, was served personally. Thereupon the case was transferred to this court, and the single question now presented is whether the State Court had jurisdiction over the person of the defendant, a non-resident, and not found within the State, and served by personal notice in the State of New York.

The effect of this proceeding if sustained is to subject a non-resident having no property within the State to a personal judgment when he is not served within the State and only served by process going out of the courts in this State into the territorial jurisdiction of another. But for the fact that the defendant is alleged to have been at the time a stockholder in the corporation against which judgment was rendered, there would be no room for question. The case of Pennoyer vs. Neff, 95 U. S. 714, would be decisive. In that case the Court says: "But where the entire object of the action to determine the personal rights and obligations of the defendants, that is where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State and summons the parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State wherein the tribunal sits can not create any greater obligation upon a non-resident to appear. Process sent to him out of the State and process published within it are equally ineffectual in proceedings to establish his personal liability.

But the argument is, that a corporation derives all its franchises and powers from the State of Missouri and that in creating such corporation the State has prescribed the liability of all its stockholders and the methods of enforcing such liabilities. That whoever takes stock in such corporation takes it subject to such conditions and assents to the enforcement of liability in the manner prescribed. That the Circuit Courts of the State of Missouri are courts of general original jurisdiction, and their findings upon the jurisdictional fact that the defendant was a stockholder can not be collaterally questioned.

Elaborate briefs have been filed pro and con; if I do not enter into any extended discussion it is not because the field is not ample, and authorities abundant, but because from the amount in controversy and the past history of similar litigation I know that the case will go to the Supreme Court, and extended discussions here would be superfluous. I am content to simply state my views. In the light of Pennoyer vs. Neff, process issued from the courts in this State has no potency outside of its territorial limits. Before any adjudication can be made against a party, that party must be subject to the jurisdiction of the Court. Before the Court had any authority to inquire whether defendant was a stockholder it must have the defendant in court. No adjudication even of the matter of jurisdiction can affect a party who is not before the Court. There is no presumption here from the silence of the record in favor of the judgment of a Court of general jurisdiction, for the manner of service is disclosed. It may be as a matter of fact defendant was a stockholder, though that fact is denied; but the same argument which would sustain this judgment against defendant would sustain a similar judgment against any man, living wheresoever he might, upon whom plaintiff might see fit to serve notice and against whom he might make some *prima facie* showing. So far as all interests which any stockholder may have in a Missouri corporation are concerned, they may be reached by process against the corporation served in any manner or at any place that the state may authorize, but so far as any personal liability is concerned, it cannot be adjudged against any individual until the fact that he is a stockholder is determined by some competent tribunal having previously thereto acquired jurisdiction of his person. With these views judgment must be entered for the defendant.

"APPENDIX A."

In the Supreme Court of Missouri, October Term 1891, Division No. 1.

W. C. Wilson, *Plaintiff in Error,*
vs.
St. Louis & S. F. Ry. Co. et al., *Def't in Error.*

Hon. Amos M. Thayer, *Judge.*

Opinion of the Court.

On the 2nd day of April, 1883, in the Circuit Court of the city of St. Louis, the plaintiff recovered judgment against the Memphis, Carthage & Northwestern Railroad Company, for $72,799.38; and execution on such judgment having been returned unsatisfied, that court on December 3rd, 1883, on motion made for that purpose, ordered and adjudged that execution issue against the defendants Seligman, on the date last mentioned. There was no appearance to this motion on the part of the defendants, Seligman, and it is a conceded fact that they never have been resident in this state, but have been, and still are, resident in the city of New York. Written notices of the intended application for execution, and copies of the motion were served upon said defendants, at their said residence.

Under the general execution thus issued, certain shares of stock, preferred and otherwise, standing in the names of J. and W. Seligman & Co., on the stock book of the defendant railway company were levied on and sold on the 18th day of December, 1883, as the property of the defendants, Seligman, plaintiff becoming the purchaser on that day, and he, thereupon, instituted the present proceeding, which has for its object the entry of a judgment and decree of that court, compelling the defendant railway company to place plaintiff's name on its transfer stock books as the owner of the shares of stock described in the petition, and to permit him to exercise the usual rights incident to such ownership, and to have the right and title of the defendants, Seligman, decreed to be in plaintiff, by reason of his purchase aforesaid, etc.

The Circuit Court on the evidence adduced at the hearing, dismissed the petition and the plaintiff comes here on writ of error.

Other facts necessary and sufficient to an understanding of the cause will be noticed hereafter, as acquired.

It is claimed in support of the validity of the execution sale, that the service of the notice and motion though made in the State of New York, and upon persons there resident and never resident in this state, was legal, and gave the Circuit Court jurisdiction to award the execution.

Section 736, R. S. 1879, provides: "If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned: provided, always, that no execution shall issue against any stockholder except upon an order or the Court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open Court, after sufficient notice in writing to the persons sought to be charged; and upon such motion, such court may order execution to issue accordingly; and, provided further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned."

It is insisted that such service may be had as provided in section 3,505, I, R. S. 1879, which reads this way: "Notice shall be in writing, and shall be served on the party, or his attorney, in the manner prescribed in this article, unless otherwise provided by law; the service may be made by delivering to the party, or his attorney, a copy of such notice, or by leaving a copy at the usual place of abode of the party, or his attorney, with some person over the age of fifteen years, or with the clerk of the party. or his attorney."

The next succeeding section, 3506, provides: "If neither the adverse party nor his attorney reside in this state, such notice may be put up in the office of the clerk of the court wherein the suit is pending or the proceedings are intended to be had."

It is plain from these statutory provisions that they refer, as their terms would naturally impart to a suit *then pending in a Court* which has already acquired jurisdiction of the party to be served with the notice; for the party thus intended to be served, is spoken of in section 3506 "as the *adverse party*," and as having an "*Attorney*" meaning an attorney of record. This language would abviously be without meanidg, where as yet, there is neither litigation nor adverse parties; and consequently, no attorneys of record, on whom notice could be served.

Thus, it will readily be seen that if the plaintiff's contention be correct, that this statute applies to the service of a notice in an instance like the present, then a service of such a notice would be equally good as to non-residents, were it simply posted up in the clerk's office, as provided in section 3506; in fact in case of a non-resident party with a non-resident attorney, this would be the *only* method.

In the same chapter 21, where section 736 is found, Section 751 occurs, which provides that "all notices, orders and rules required in the progress of any cause, shall be served in like manner as in other civil cases." This section evidently refers also to *interlocutory* notices, etc., those "required in *the progress* of the cause," and not to those notices, etc., by which the *action is begun*. The statute in question really makes no provision for the method of the service of notice; it merely requires "sufficient notice in writing *to the person sought to be charged*. "The evident object of the statute was to provide that the motion should be in the nature of an action at law, and governed by the usual incidents pertaining thereto. And where the statute requires notice without any qualification, *personal* notice must be given. "The doctrine of constructive notice is altogether the creation of statutory enactment, and has no existence until it receives legislative recognization." Leach vs. Cargil 60 Mo. 316.

But the personal notice in this case, having been served outside of the State, *has not been served accordtng to law*, for the statute nowhere permits or directs this sort of service, and therefore, the notice in question was a nullity; because wherever service is had or notice given with the view of subsequent adjudication, such service or notice must comply with statutory requirements, in order to possess any legal efficacy. Allen vs. Singer Co., 72 Mo. 326 and cas. cit.

Mere notice or service, not according to law, brings no one to court, nor does mere knowledge on the part of the party notified of the pending proceedings, have any more valid effect. Potwine's Appeal, 31 Conn. 331; Smith Merc. Law 322, wherever proceedinsg are intended to result in an adjudication, and such proceedings differ from the course of the common law, a strict compliance with all material directions of the statute is essential. Freeman Judgments, (3rd Ed.) Sec. 127 and cas. cit. No such compliance with the statute, can be claimed here.

2. It will not be intended that the statute authorizes such a method of service as that on which plaintiff relies; but if the statute *did in terms* require the personal service of such notice outside of the State on a non-resident in order to the rendition of a personal judgment, or its equivalent, on a money demand, such statute would be wholly void as to such extra-territorial service. It scarcely requires to be stated that this position is sustained by abundant authority; indeed it seems to be questioned by none. On this point Judge Cooley after speaking of the validity of substituted service by publication &c. says: "But such notice is re-stricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statutes may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control of the state; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceeding, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he con enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another state or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a state, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond

this, due process of law would require appearance of personal service before the defendant could be personally bound by any judgment rendered." Cooley's Const. Lim. (5th Ed.) 500-1, and case cited. See also Punce vs. Bowler, 12 A. & E. R. R. cas. 576; Brooklyn vs. Ins. Co., 99 U. S. 362; Pennoyer vs. Neff, 95 U. S. 714; Sim vs. Frank, 25 Illinois, 125; Story on Conflict of Law, Sec. 546 et seq.

"The tribunals of one state have no jurisdiction over the persons of other states unless found within their territorial limits; they cannot extend their process into other states, and any attempt of the kind would be treated in every other forum as an act of unsurpation without any binding efficacy. "The authority of every judicial tribunal, and the obligation to obey it, "says Burge, in his commentaries are circumscribed by the limits of the territory in which it is established." Galpin vs. Page, 18 Wal. 100, cit. 367.

Judge Storey says: "Considered in an international point of view, jurisdiction, to be rightly exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for, otherwise, there can be no sovereignty exerted upon the known maxim: *Extra territorium jus dicenti impune non paretur.* * * * On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals. This subject, however, deserves a more exact consideration. "Story Confl. Laws, Sec. 539.

Drake says: "But where no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment against the defendant, based on a publication of the pendency of the suit will be void, and may be impeached collaterally, or otherwise, and forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it; notwithstanding the statute law of the State expressly authorizes a judgment to be rendered against a defendant under such circumstances. In case of this description, while a levy on property would justify the exercise of jurisdiction, and the garnishment of one indebted to the defendant would be regarded, *pro hac vice*, as equivalent to a levy, yet the indebtedness of the garnishee must be *shown*; and a judgement rendered against a garnishee who does not appear and answer, and against whom, in such case, the statute authorizes judgment to be rendered for the whole amount of the judgment against the defendant, without proof of his indebtedness to the defendant, will not sustain the jurisdiction. Drake Attachm. (6th Ed.) Sec. 449.

"Even if a State has passed a statute authorizing its courts to take jurisdiction of personal actions against debtors or others who cannot be reached by process, or of property actions when the property cannot be seized actually or constructively, and if the courts proceed accordingly and render judgments, such judgments are not to be regarded by the courts of other states, nor by Federai Courts sitting within the state, nor by the courts of the State itself, for the reason that no state can exercise power beyond its bounds, nor conclude persons or property beyond them. Such statutes have been passed; such power has been assumed and exercised, in more than one state, though very rarely. Courts have been thus nominally authorized to take cognizance of personal actions against non-residents, after publication notice, without personal summons, personal appearance, or attachment of property; but the Supreme Court of the United States has decided such proceeding under such statute to be jurisdictionless, null an void. Waples Attach. 339.

In Smith vs. McCutchen, 38 Mo. 415, a judgment *in personam* for a debt was rendered upon a mere order of publication, and such judgment was held absolutely void, and that a party summoned as garnishee upon such judgment could defend and show the invalidity of such judgment by reason of want of jurisdiction in the court to render it. To the same effect, see also Latimer vs. R. R. 43 Mo. 105, and numerous other authorities cited by defendfendants.

3. And it is entirely immaterial what is the means or method pointed out by the statute, or used in this instance to acquire jurisdiction of the defendants Seligman, whether by writ or notice, it is properly denominated "*process*." Com. Dig., Vol. 6, p. 389; Anderson Law Dict. Tit. Proc. Dwight vs. Merritt, 18 Blatch. 306; Middleton Paper Co., 19 Fed. Rep. 252. If process, then the necessity for such process being served in the method prescribed by law, and that such law, and that such method does not attempt to extend jurisdiction beyond the proper territorial limits is obvious. See 18 Blatch., and 19 Fed. Rep. *supra*, as well as former authorities.

The process in this cause being unknown to the law, as to its method of service, and as to its extra territorial operation, if that method were otherwise legal, must be held as no process *at all*, 18 Blatch. and 19 Fed. Rep. supra. Every subsequent step dependant thereon, must therefore, be deemed void. In concluding this paragraph it may be remarked that section 736 requires "sufficient notice in writing *to the person sought to be charged*."

In England, from whence that section was derived, it was held prior to our statute being amended so as to be a copy of the English law, that such notice must be *personal*. Ilfrancomber Ry. Co. vs. Devon, etc., 2 L. R. C. P. 15; Edwards vs. Kilkenny, etc., 1 C. B. (N. S.) 409. Under the operation of a familiar principle this construction of the statutes followed and attended its adoption in this state, Skrainka vs. Allen, 76 Mo. 384; Skouton vs. Word, 57 Mo. 380. But for reasons already given, such service though personal, was valueless because made outside of our jurisdiction.

4. Nor is this case unfavorably altered for the defendants Seligman, because they are charged with being stockholders in the corporation against which the plaintiff recovered judgment.

A stockholder is not in any sense a party to the judgment rendered against a corporation to which he may belong, nor does such judgment bind his property; Hardwick vs. Jones, 65 Mo. 54; Hannah vs. Bank, 67 Mo. 678; Berkley vs. Ins. Co., 26 Mo. 490; Whitman vs. Cox, 26 Mo. 255; Bank vs. Cook, 4 Pick. 405; Adams vs. Bank, 1 Glf. (Me.) 361. In Blackburn vs. Railroad Co., it was ruled that upon a corporation being sued, a stockholder is not a party to the action, and not before the court. 58 Ga. 189. And in England in Hitchings vs. Ry. Co. *in re* Emery 20 L. J. C. P. 31, where the proceeding was on the English statute, already referred to, by motion for judgment against a debtor of the corporation, Maule J. says in referring to a former case: " In that case it was held that the facts must be suggested upon to the record. This is an attempt charge a person on execution who is not a party on record. The principle in this decision is this, that the party should have some opportunity for having the matter tried by jury and bringing a writ of error if necessary; and although the act says that execution shall issue its means after the proper steps have been taken to make the person entitled to be charged a party to the record. "This ruling was made in 1850.

Accepting these authorities as the correct guide, any proceedings against the stockholders subsequent to the judgment redered against the corporation, must be regarded as an *original and independent proceeding*, as much so, as in garnishment process against a mere stranger to the record. But unless the service upon the garnishee be valid in form, and be served within the jurisdiction rendering the judgment, such judgment when rendered will not bind him. Novel vs. Porter 62 Mo. 309; Drake Attach. (6th Ed.) Sec. 451 d: Thompson Liab. Stockh. Secs. 357-359. "And in order to bind a stockholder in a corporation who is the debtor of such corporation, he must be subject to the process of the court by being found and served within its jurisdiction, and there sued just as a garnishee by having the garnishment process served upon him. Garnishment process is held to be a suit. Drake Attach. Sec. 452; Meints vs. East St. Louis &c. 89 Ill. 48.

The process against the defendants Seligman, *was in substance and effect a process of garnishment*, since it sought to appropriate to the demand of the plaintiff, whatever debt they might owe to the judgment debtor, the corporation. Drake Attach. Sec. 452; Waples on Attach. 342, 3, 4, 5.

There are indeed, strongly resemblant features between process which summons for judgment a stockholder and process which summons for a like purpose an ordinary party as garnishee. In either case, notwithstanding the proceeding is sometimes said to be auxilliary to the main one, yet in both, the movement against the stocholder as well as the garnishee is an independent and original *action*, and so this court has treated it, in regard to stockholders. Erskine vs. Lowenstein 82 Mo. 301; State ex rel. vs. Court etc., 87 Mo. 394. In which latter case it was ruled that a "motion for execution against a stockholder should be treated as a part of the record without being copied into the bill of exceptions." This ruling is alone consistent with the theory that such motion occupy a different plane, from those motions which are interlocutory in their nature, and can only become a part of the record by being presumed in the bill of exceptions. In the former case it was held that a motion for execution was in the nature of a suit in equity at common law, to reach assets in the hands of the stockholder.

Any process, whether notice, writ or motion, which, when served upon a party, will have the effect to authorize an order or judgment *in personam* against him, upon the condition of which a general execution may issue leviable on all the property in the state, of which he may be possessed, cannot be regarded in any other light *so far as that party is concerned, than as an independent proceeding.* Were such a party sued in another form of action, no doubt could be entertained of the necessity for notice proper in form and substance, and served with the proper jurisdiction in order to its validity. But in a summary proceeding under the statute, there are the same personal issues to try, to-wit: Whether the person sought to be charged is indeed a stockholder, and if he is indeed indebted to the insolvent corporation, and the same necessity for the observance of all the essentials necessary to the arrival at a correct conclusion, and in the end there is the same personal judgment to be entered if the proceedings are successful.

No substantial dictinction can therefore be taken between the incidents which naturally accompany service of process in the two cases whatever cause would invalidate the service of process in one instance would do so in the other; in either case the proper service of the process in all respects, is essential to the jurisdiction of the court, and essential, also, in that it must meet the constitutional mandate respecting due process of law.

The law regards the substance of things, not their shadow.

This is the view taken in Kansas on a statute which is virtually a copy of Sec. 736, and there it was held that such a motion partakes of the nature of original process, and that if served on a stockholder in Chicago, that such is valid and the party defendant may appear specially and have the resultant order vacated. Howell vs. Mengelsdorf 33 Kans. 193. In that case, the following apt quotation is approvingly made: "Where the objact of the action is to obtain a judgment against the defendant upon which an execution may issue to be levied generally of his goods and chattles, or of his property, personal, real and mixed, it is necessary at common law that there should be a personal notice, citation, summons or subpoena or that the defendant should voluntarily appear to the action. In case of this character, such notice or appearance is indispensable to the jurisdiction of the court. Wade Law Notice Sec. 1137.

Various citations, which either directly or by necessary implication support the conclusion announced in the case just cited, will be found collated by the industry of counsel for defendants. Being well satisfied of the invalidity of the service of process in this case on the different grounds constitutional and otherwise already stated, it is deemed unnecessary to discuss in detail the authorities cited in opposition to these views; none of them, however, it is thought will be found on examination to announce a doctrine materially at variance with what has already been advanced, and if they did, we should not be inclined to follow them. But it may be said in concluding the discussion on this point that if as already seen from the authorities cited it is beyond the power of the legislature of the state to extend even by express statutory enactment the jurisdiction of its courts or to lengthen the reach of their process, then most certainly it would be wholly beyond the power of parties by any contract made by them, to have a similar jurisdictional effect, an effect entirely beyond the power of the legislature to authorize; an effect which once admitted would immediately wipe out not only state boundaries and constitutional provisions; but be limited alone by the boundaries of the habitable globe, for thus far upon such a theory would jurisdiction extend and process run.

The base for such a theory of the law it must be confessed, would be quite simple:

1. Given, a contract made in any state, by a non-resident thereof.

2. Imply a contract, based upon the former, of submission to any jurisdiction the state where the contract is made may choose to have her courts assume over such contracting party, or which such courts may assume and the jurisdictional formula is complete.

(The balance of the opinion of the Court discusses and decides the question of the sale of stock in a corporation under execution, as against unregistered holders of such stock where the purchasers at the execution sale buys with notice of the interest claimed by the unregistered holder.) * * * The court then concludes:

The considerations aforesaid lead to an affirmance of the judgment, and it is so ordered. Black &. Brace, J. J. concur in all that has been said. Barclay, J., concurs in paragraphs 5 and 6, and expresses no opinion on the other points.

T. A. SHERWOOD.

Office Supreme Court U. S.
FILED.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

WILLIAM C. WILSON,
Plaintiff in Error,

vs.

JESSE SELIGMAN,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR DEFENDANT IN ERROR.

JAMES O. BROADHEAD,
Attorney for Defendant in Error.

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There is but one point in this case presented for the consideration of the court, viz:

Whether, under the statutes of Missouri, after judgment against a corporation, and where an execution has been issued against the corporation and returned nulla bona, a judgment in personam can be rendered against a stockholder of such corporation by a Missouri court, upon service of notice in another State, when the stockholder so served is a resident of and domiciled in such other State.

In this case a judgment was rendered and award of execution made by the Circuit Court of St. Louis, Missouri, against Jesse Seligman, after service of process on him in New York, where he resided, judgment having been rendered against the corporation and a return of *nulla bona;* the defendant in error did not appear in court, either in person or by attorney.

The judgment against the corporation is founded, of course, upon the indebtedness due to the plaintiff, but the stockholder was no party to that suit; he is one person, the corporation is another; he could not defend if he would; he is neither party or privy to the suit. The execution is to be issued to the extent of the unpaid balance of such stock by him or her owned. The question then to be ascertained is, was he a stockholder, and if so, what is the unpaid balance on the stock, or whether there is any unpaid balance. In other words, how much is he indebted to the company, if the company had sued for the unpaid balance? It would be like any other suit, it must be regularly brought, and process regularly served.

But the creditor of the corporation now stands in the place of the corporation. He has a judgment unpaid; he has a right when it is ascertained in his proceeding against the corporation that there are no assets which can be levied on by his execution, to proceed against the debtors of the corporation to collect his debt from the debtors of the corporation. He is subrogated to the rights of the corporation, and if it be ascertained that a stockholder is indebted to the corporation for unpaid subscriptions of stock, he has a right to an execution against him to the extent of this unpaid subscription; "the debt is originally the debt of the corporation, and not the debt of the stockholder."

See McClaren v. Franciscus, 43 Mo. 465.

It only becomes his debt upon a return of an execution against the corporation of *nulla bona*, and not then until it is made to appear that he is indebted to the corporation by reason of an unpaid subscription on his stock. To determine this question is in its nature a suit, and a suit between the plaintiff in the execution and the stockholder. How is he to be brought into court?

The proceeding is to be summary, upon motion in open court, after sufficient notice in writing to the person sought to be charged, and in the court where the suit or other proceedings against the corporation shall have been brought. The notice is to be sufficient—that is, the time of service of notice is left to the discretion of the court, except so far as the court may be restrained by the general provision of law in regard to time of service.

This is a proceeding, then, to enforce a personal liability created by statute against a stockholder in favor of a creditor of the corporation, upon proof that he is indebted to the corporation.

Section 736, of the Revised Code of 1879, provides for issuing an execution against a stockholder, to the extent of the unpaid balance of his stock, after a return of *nulla bona* against the corporation: "*provided* always that no execution shall issue against a stockholder except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged."

The corporation law makes no provision for the manner of serving this notice—it must be in writing and given to the person sought to be charged.

This provision of our statute in regard to executions against stockholders is taken from 9 Victoria, ch. 16, Sec. 36.

See Skrainka v. Allen, 76 Mo. 388.

The main question before our Supreme Court in this case was, whether defendant was a stockholder at the time of the return of *nulla bona*, or at the time of the filing of the motion (and this is a defense also).

In Nixon v. Green, 2 Exch. 549, the court said: "In order that no injustice may be done, and that it may be ascertained who those persons are, notice must be given, so that the persons against whom the proceedings are taken may have an opportunity of showing that they were not stockholders at the time of the return of *nulla bona*.

Before an execution can issue there must be an order of court to that effect, and our Supreme Court, in the case above cited, says:

"There was an obvious propriety in changing the law so as to require the judgment creditor to apply to the court for execution against the stockholder, instead of leaving that matter to the judgment and discretion of the officer having the execution, as was provided by the law of 1855, inasmuch as all the questions affecting the relations of the stockholder of the corporation and its creditors can, as the law now stands, be investigated and determined before the execution is issued and the property of the stockholder sold."

To make this order for an execution, to make the inquiry as to whether the stockholder is liable for the debt of the corporation by reason of the fact that he owes an unpaid subscription of stock, the court must have jurisdiction of the person.

In Huff v. Sheppard, 58 Mo. 246, the court says:

"Jurisdiction over a person can never be acquired unless by a method specifically provided by law or by consent of the party; if the legal method has not been employed and the party refuses his consent, an assumption of jurisdiction by the court will be purely arbitrary."

The English statute of 8 and 9 Victoria, ch. 16, Sec. 36, is word for word our statute of Missouri; it is as follows:

"If any execution, either at law or equity, shall have issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the stockholders to the extent of their shares respectively in the capital of the company not then paid up: Provided, always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon motion such court may order execution to issue accordingly (and for the purpose of ascertaining the names of subscribing shareholders, and the amount of capital stock remaining to be paid upon their respective shares, it will be lawful for any person entitled to such execution at all reasonable times to inspect the register of shareholders without fee)."

Supreme Court of Missouri has said, in the case of Skrainka v. Allen, 76 Mo. 389, in referring to this very statute:

"It is the settled practice of this court, where the statute of another State or country is enacted here, to place the same construction upon such statute that it had at the time of its adoption in superior courts of the State or country from which it was taken." This rule would seem to give more than ordinary force to the English decisions, which might ordinarily be regarded only as a persuasive authority.

Now, we propose to call the attention of the court to some of the English decisions of the statute of 8 and 9 Victoria, and we think it will clearly appear that if they are to have any force in the interpretation of our statute, this court must come to the conclusion that the judgment and award of execution in this case is utterly void.

Edwards v. Great Western, etc. R. R. Co., 1 C. B. N. S., 409, held that the service must be personal.

The practice in England, under the Victoria statute, is:

1. The affidavit setting out the facts of the rendition of the judgment, the issue of an execution against the corporation, the return of *nulla bona*, the fact that the party is a stockholder in the corporation, and that this stock, or a portion thereof, is unpaid, and asking for a rule *nisi* for the issue of a writ of *scire facias* against the stockholder.

Upon a return to the rule which must be served personally, the stockholder has to show cause why the execution should not issue.

See Lee *et al.* v. Budo & Torrington, J. R. R., 19 Weekly Rep. 955.

And the court will exercise its discretion as to whether the execution shall issue.

And held, that the court will not grant a rule for a *scire facias* against a party as a shareholder, upon a judgment obtained against a company, unless the affidavits disclose reasonable grounds for believing that the party sought to be charged is a stockholder.

See Edwards *et al.* v. Kilkeney & Great W. R. R. Co., 14 C. B. R. N. S. 523. (The section of the English statute is recited in full in a note to this case.)

In this case Earl, C. J., said: "We must have reasonable evidence that the party sought to be charged is really a shareholder before we allow the *scire facias* to go. If it be manifest upon the materials before us that the proceedings must result in a nonsuit or a verdict for the defendant, it would be imposing a great hardship and injustice on the party to put him on the defense." Chief Justice Earle considers this a suit.

See also Mather v. *Nat. Ass. Association*, 14 C. B. N. S. 676.

In Hitchkins v. Kilkeney & Great S. & W. R. R. Co., 15 C. B. 458, held, that to entitle a judgment creditor to a *scire facias* against a shareholder, it is not enough to show that a *fi. fa.* had been issued against the company and returned *nulla bona*. The affidavit must allege circumstances to satisfy the court that due diligence has been used by the plaintiff to discover property of the company, out of which he might obtain satisfaction of the judgment.

In these proceedings there was the English practice—upon the rule; a declaration in *scire facias* and a plea.

See Nixon v. Brownlow, 1 Hurlstone & Norman, 405 (Exchequer Reports).

And before the writ of *scire facias* issued, the person charged as stockholder was authorized to file affidavits in reply.

See Scrimpton v. Sidmuth R. R. Co., 3 L. R. Com. Pleas, 80.

The shareholder is entitled to show any defense, legal or equitable.

In the case of Hitchkins v. Kilkeny & G. S. W. R. Co., 10 C. B. 160, the court says, before the plaintiff can be permitted to issue execution against a shareholder a *scire facias* is clearly necessary.

Although the statute says that execution may issue against the shareholder, it does not mean that the ordinary machinery for bringing him before the court shall be dispensed with. In this case the motion was for an execution, and it was claimed and so held that the motion should be for leave to issue a *scire facias*.

See Bartlett v. Penstand, 1 B. & A. 704, where a person not a party to the record is to be affected by the judgment. There must be a suggestion made by leave of the court in the proper form, so as to afford an opportunity to the party to be affected by it to demur if he thinks the facts suggested are insufficient on point of law, or to plead if he means to deny them.

Lord Tenterden, C. J.

This is supported by Lord Denman in Bosanquet v. Ramsford, 11 A. & E. 528, new parties must be introduced by *scire facias*.

See also to the same effect Crop v. Law, 6 Meeson and Welsby, 217.

The claims in the case on the part of the plaintiff in the execution are based upon the ground that this proceeding is a mere continuation of the proceedings against the Memphis, Carthage & Northwestern R. R. Co., and that the defendants in this case, as stockholders, were in effect parties to that suit, and, therefore, proceedings may go against them without process, but this is not so. Assuming, however, that this is so, there is behind it the vital questions of stockholder or no stockholder, which happens to be the identical question of debt or no debt; and if our being bound by the award of execution depends upon the question of stockholder or not, it can certainly not be permitted for the court to assume that we are stockholders, for the purpose of determining whether we are debtors or not. No court can assume the fact upon which the claim of jurisdiction is undertaken to be maintained.

The references to the English cases are for the purpose of showing that this proceeding against a stockholder is a separate proceeding *in personam* against him, and whether it be a part of the proceeding in the suit against the corporation or a separate or independent suit, it is a new proceeding, so far as the stockholder is concerned, and that he is entitled to the same process of law as he would be in any other suit by which it is sought to deprive him of his property.

In the case of Pennoyer v. Neff, 5 Otto, 714, cited by plaintiff, the court holds that a personal judgment is without any validity if it be rendered by a State court, in an action on a money demand against a non-resident of the State, upon whom no personal service of process within the

State was made, and who did not appear. But plaintiff says that the court also holds that the State may require a non-resident entering into a partnership or an association within its limits, or making contracts enforcible therein, to appoint an agent in the State to receive service of process and notice in legal proceedings instituted in respect to such partnership, association or contract.

This we do not deny, but that is not this case. We have long had such a law in reference to insurance companies, but there is no such law in this State applicable to stockholders, or to any other individuals.

The evidence submitted in regard to the issue of the stock certificate to J. & W. Seligman & Co., is exactly the evidence upon which both the Supreme Court of Missouri and the Supreme Court of the United States have decided that they were not stockholders of that company in the sense contemplated by the statute, but that they held the stock in trust for the purposes mentioned in the contract. (Burgess v. Seligman, 107 U. S. 20; Union Savings Bank v. Seligman, 92 Mo. 635.)

In the case of Pennoyer v. Neff, 95 U. S., the court says, p. 722: "The other principle of public law referred to follows from the one mentioned: that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory," referring to Story's Confl. of Laws, ch. 2, Wheaton's In. Law, p. 2, ch. 2, and further, at p. 727:

"Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them; process sent to him out of the State, and process published within it are equally unavailing in proceedings to establish his personal liability." (p. 727.)

And further, at p. 733, the court says: "Since the adoption of the 14th amendment, the validity of such judgments may be directly questioned and their enforcement in the State resisted, on the ground that proceedings in a court of justice, to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law."

But it is claimed that the stockholders are bound by the judgment against the corporation, and so he is if he is a stockholder; but he cannot appear and contest the suit against the corporation (see Thompson on Liabilities of Stockholders, Sec. 379), which shows that it is not a suit against him. But the question still remains, is he a stockholder? If he is not, then the judgment against the corporation is nothing to him, any more than it would be to any other person in no way connected with the corporation.

It is competent to show in a suit on foreign judgment, that the court acquired no jurisdiction over the party. Barlow v. Steel, 59 Mo. p. 88; it may be shown that the defendant did not appear, although the judgment recites that he did. Latimer v. M. P. R. R., 43 Mo. R. p. 109, court holds "the well established and settled principle is, that to give a court jurisdiction, a real defendant, against whom the plaintiff is entitled to a judgment, must be served and found within the limits of the jurisdiction, or some property or chose in action of his must be found upon which the court can proceed *in rem.*"

"Every such attempt on the part of one nation or State by its legislature to grant jurisdiction to its courts over persons or property not within the territory, is mere usurpation, and all judicial proceedings in virtue thereof are held utterly void."

It is true that the defendant's liability to the creditors of the corporation arises from the fact that he is a stockholder; but it is not alone because he is stockholder, but because he is indebted to the corporation, that he can be proceeded against for the unpaid balance due on the stock subscriptions of stock. He does not owe that debt in his character only as a stockholder, but he is liable as an individual—a personal liability. The execution asked for may run not only against the alleged stockholder's interest in the corporation, but against any other property he may have, and the order has the effect under our statute of a personal judgment against him for the amount of the debt due by him to the corporation.

The Supreme Court of Missouri, in the case of Eppright v. Nickerson, 78 Mo., pp. 487, 490, held that the unpaid subscriptions of stock in a corporation constituted a debt, and was part of the assets of the company and passes by an assignment of the credits of the company.

It is only in his character as a stockholder that the defendant can be considered in any sense a party to the original suit against the corporation. But here is a controversy between the corporation and defendant, an adversary proceeding, so far as he and the corporation are concerned, it remains none the less so because the creditor is in a sense subrogated to the rights of the corporation, just as in the case of garnishment the judgment creditor has the right to proceed against any one who may owe the judgment debtor. The only sense in which the stockholder can be considered a party to the proceeding against the corporation, is that he cannot impeach the judgment against the corporation for irregularity or error. But if the party is not a stockholder, then he is in no sense bound by this judgment, and certainly he has a right to be heard as to whether he is or is not a stockholder, because that is the beginning of his liability. And this question cannot be tried until he has been properly served with process, and until he is served with process the court has no jurisdirtion over him to determine this question.

The Supreme Court of Kansas has, in a case similar to this, and under a statute copied literally from ours, so far as this question is concerned, decided that a notice like this served in the City of Chicago was not sufficient to confer jurisdiction on the court in Kansas.

Howel v. Merglesdorf, 33 Kan. 194.

In the case of the Union Sav. Association v. Seligman, reported in 92 Mo., p. 635, the Supreme Court of Missouri overruled their former decisions upon the question as to whether the Seligmans were stockholders, and held that they were not stockholders in this railroad company upon the same facts exactly as were presented in the case now before the court, and recognized the correctness of the decision of the Supreme Court of the United States, in the case of Burgess v. Seligman, 107 U. S., p. 20, which was decided under the same state of facts, and referred with approval to the decision of the Court of Appeals of Maryland, by which the same question was decided in the same way.

The defendants were permitted to show that they were not stockholders, although their names appeared on the books as stockholders.

The counsel on the other side says:

"The fact that they were stockholders gave the court jurisdiction to determine the fact and extent of their liability." But the question may be asked—how could the court determine that they were stockholers in the absence of the parties who have the right to put in issue the averment that they were stockholders, when their personal liability to pay the debt to the corporation depends—and depends entirely upon the fact that that they were stockholders? This is begging the whole question as to whether the court had acquired jurisdiction over them. This jurisdictional fact was determined by the court without a hearing, and therefore the jurisdictional fact was not established.

This court had already decided that they were not stockholders in the statutory sense, so as to make them liable as such in the case of Burgess v. Seligman, and reference is made to that very case in the testimony contained in the record in this case. (See page 41 of the Transcript.)

There is no doubt but that the statute of Missouri in regard to proceedings against stockholders is a valid and constitutional enactment, but the question is whether a judicial tribunal of Missouri can exercise extraterritorial jurisdiction over a citizen of another State, who is not served with process within the territory of the State, it matters not whether that process is by notice or writ—no statute of the State authorizes it, and if it did so authorize it, the act would be void.

A corporation may forfeit the stock of its stockholders for the non-payment of a balance due upon the stock, but it could not sue the foreign stockholder in the State where the corporation has its domicil by service outside of the jurisdiction of such State.

The gentleman on the other side has totally misconceived the purport of the decisions of the English courts when he refers to the cases of

Vallee v. Dumerque 4th Exchequer Report, p. 289,
Copin v. Adamson, Law Reports, 9 Exchequer, 345,
and
Bank of Australia v. Harding, 16 Q. B. 717,

as will be seen by reference to those cases.

In all those cases there was a contract on the part of the stockholder—that in case of controversy, constructive service might be had on an agent of the stockholder, or by leaving the process at a place of domicil to be selected by him, upon the same principle that leaving the writ at the usual place of abode of the defendant is declared to be constructive service and is to have the same effect as if there were personal service.

In the case of Copin v. Adamson, 9 Exchequer, 345, the opinion of Kelly, C. B., was not the opinion of the court.

There were two replications in that case—the *first* setting up the contract made by the stockholders with the corporation in regard to the mode of service, the second setting up the point that the stockholder having become a member of a foreign corporation thereby became subject to the laws of the foreign country in all things, including the law in regard to the manner of service.

Kelly decided both replications to be good—the other two judges held that the first replication was good, but that the other was bad, and upon appeal their decision was sustained. (See 45 Law Journal, Common Law, p. 15.)

Kelly's opinion was not sustained either by the other two judges or by the appellate court.

But our Supreme Court of Missouri has settled this question in this very case, and holds the judgment to be a void judgment. See the opinion of the court by Sherwood, Justice, published at length in our other brief, and this decision is purely upon the proper construction to be given to a Missouri statute.

And so in the face of a decision of the Supreme Court of the United States, and a decision of the Supreme Court of Missouri, to the effect that the Seligmans were not liable as stockholders of the corporation, and a decision of the Supreme Court of Missouri in this very case to the effect that the judgment was void, the defendant in error must go hence without day.

It is hardly necessary to reply to the XIV point made by the counsel for plaintiff in error, at page 65 of his brief, viz: That the motion to quash the execution and the order declaring the judgment void, were made more than three years after the rendition of the judgment.

A void judgment is always invalid, and no lapse of time can ever cure it.

The authorities referred to in his brief, relate to erroneous judgments alone, and not to *invalid* or void judgments.

Errors of judgment are permitted to stand, if steps are not taken in time to correct them; but no such steps are needed in the case of a void judgment.

In the case before the court, suit was brought on a judgment which we say was no judgment at all, because it was void, the court not having jurisdiction over the party against whom the judgment was rendered.

JAMES O. BROADHEAD.